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In The

Supreme Court of the United States

TED L. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question I

Does the Fourth Amendment authorize the search of a computer for evidence that its owner knowingly received and possessed child pornography solely because unsolicited adult and child pornography was e-mailed to the owner eighteen months prior?

Question II

Can a federal prosecutor's approval of an affidavit drafted to accompany a search warrant application support "objective good faith reliance" on the resulting warrant, if a reasonable officer would objectively know that the affidavit lacks probable cause?

Question III

Does the Fourth Amendment authorize the search of a computer for evidence that its owner knowingly received and possessed child pornography, when the affidavit in support of the search warrant recites a child pornography collectors' profile but alleges no facts showing that the suspect was a member of the profiled group?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ted L. Pappas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears at App. 1, in the Appendix to this Petition and is found at *United States v. Pappas*, 592 F.3d 799 (7th Cir. 2010).

The Order of the United States District Court for the Eastern District of Wisconsin, granting Petitioner's Motion to Suppress, appears at App. 21 and is found at *United States v. Pappas*, 2008 U.S. Dist. LEXIS 103997 (E.D. Wis., Dec. 16, 2008).

The Order of the United States District Court for the Eastern District of Wisconsin, denying the Government's Motion to Reconsider, appears at App. 12.

The Magistrate Judge's Recommendation to the Honorable Charles N. Clevert, Jr. appears at App. 35.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on January 21, 2010.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment IV provides:

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CODE

18 U.S.C. §2252

§2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 U.S.C. §1151], knowingly

sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title [18 U.S.C. §1151], knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more

books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591 [18 U.S.C. §1591], chapter 71, chapter 109A, or chapter 117 [18 U.S.C. §§2251 et seq., §§1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment,

or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 [18 U.S.C. §§2251 et seq., §§1460 et seq., 2241 et seq., or 2421 et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant –

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person,

other than a law enforcement agency, to access any visual depiction or copy thereof –

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

STATEMENT OF THE CASE

On November 27, 2006, Special Agent Elizabeth Hanson ("Hanson") drafted an affidavit in support of a search warrant, to search the residence and computers of Ted L. Pappas ("Petitioner"). App. 65-83. She alleged that Petitioner received child pornography in interstate commerce, in violation of 18 U.S.C. §2252.[1] App. 65.

In paragraphs 1 through 4 of the affidavit, Agent Hanson outlined her expertise and experience. App. 66-68.

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[1] The AUSA who reviewed the affidavit apparently approved its allegation that Petitioner received "child pornography" in violation of 18 U.S.C. §2252. However, crimes involving "child pornography" are prohibited by 18 U.S.C. §2252A, while §2252, although addressing similar behavior, expressly criminalizes "sexual exploitation of minors." Petitioner was eventually indicted under §2252(a)(4)(B). *See* App. 3, 21. This Petition follows the verbiage in Agent Hanson's affidavit and in the court opinions below, by referring to "child pornography" and its alleged knowing possession and receipt by Petitioner.

Paragraph 5 asserted Hanson's belief that evidence of Petitioner's suspected crimes would be found at his home and on his computers. App. 68.

Paragraphs 6 through 15 defined various computer-related terms, but did not define terms related to internet communications. App. 69-72.

Paragraph 16 stated that, eighteen months prior, over a thirty day period, Michael Golubski of San Diego, California, had sent seventeen e-mails with movie or image attachments to the e-mail address "longtalks@aol.com." App. 72.

Paragraph 17 stated that eleven of Golubski's seventeen e-mails contained attachments with child pornography, five contained attachments with adult pornography, while one contained an attachment depicting a female "of questionable age." This paragraph also described some of the attached images. App. 72-73.

Paragraph 18 stated that "longtalks@aol.com" had been an e-mail address registered to Petitioner, while Golubski was sending his e-mails and for about 60 days thereafter. At that time Petitioner deleted the e-mail address "longtalks@aol.com" from his AOL account and selected another address. App. 73-74.

Paragraphs 19 through 23 recited Petitioner's personal history. App. 74-75. They noted Petitioner's two convictions from the 1980s, for burglary and disorderly conduct. They also stated that Petitioner had a Wisconsin drivers license, owned a home in Wisconsin,

designed and tested healthcare equipment for a living, and used AOL as his internet service provider.

Paragraph 24 contained the so-called "collectors' profile," which averred, among other things, that people who collect child pornography keep it for a very long time. App. 75-77.

The affidavit did not state that Golubski's e-mails contained anything to indicate their pornographic content; nor that Golubski placed the pornographic images in "embedded attachments," which would have automatically appeared on the screen upon opening an e-mail.

The affidavit contained no facts indicating that Petitioner fit the collectors' profile.

The affidavit cited no evidence indicating that Petitioner was interested in child pornography, had ever subscribed to websites with child pornography, had ever possessed child pornography, solicited child pornography from anyone, opened Golubski's e-mails or acknowledged their receipt, or had ever communicated with Golubski in any way.

In summary, the affidavit cited no fact regarding Petitioner, nor any act or behavior on Petitioner's part, in any way related to the crimes Hanson was accusing Petitioner of.

Hanson consulted with an Assistant United States Attorney, concluded that probable cause existed and she drafted, and filed, a warrant application with a supporting affidavit. App. 2, 10. Magistrate Judge

William Callahan issued the warrant and Hanson executed the search.

During a subsequent forensic search of Petitioner's computer, images of child pornography were found, leading to Petitioner's indictment on two counts of possession of child pornography in violation of 18 U.S.C. §2252(a)(4)(B). App. 3, 21.

On July 29, 2008, Petitioner moved to suppress all evidence obtained during or in connection with the execution of the warrant, arguing that the affidavit failed to allege probable cause, cited no facts showing that he fit the criminal profile, and that the alleged facts were stale. Petitioner argued that the warrant should not have been issued. App. 35-37.[2]

Magistrate Judge Patricia Gorence recommended that Petitioner's Motion to Suppress be granted. App. 55.

Magistrate Gorence concluded that the facts alleged were insufficient for probable cause, App. 52, 55; that no factual "bridge" specific to Petitioner connected him to the collectors' profile, App. 51-52, 54; that, under the totality of circumstances, the facts in the affidavit were stale, App. 52; that Agent Hanson

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[2] In moving to suppress, Petitioner also requested a *Franks* hearing, pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), but Magistrate Judge Gorence denied the request and Petitioner did not appeal its denial. App. 39-41.

did not have "objective belief" that Petitioner was a collector of child pornography or that probable cause existed, App. 54-55.

The United States District Court for the Eastern District of Wisconsin adopted Magistrate Gorence's recommendation, conclusions and analysis, App. 21-34, and wrote, in pertinent parts:

> First, there is not a whit of evidence in the affidavit indicating that Pappas fit a collector profile despite the boilerplate recitations included in the affidavit. . . . Thus, a reasonable agent should have concluded the affidavit lacks the necessary bridge connecting boilerplate averments about collectors of child pornography to Pappas. App. 27.
>
> . . .
>
> Because the affidavit fails on its face to connect Pappas to the child pornography collector profile, any reliance on collectors' tendency to retain possession of illegal images for periods of time is inappropriate. App. 28.
>
> . . .
>
> The inquiry is objective and assumes a reasonable officer's knowledge of what the law requires. To that end, suppression is appropriate if the affidavit in support of the warrant so lacks indicia of probable cause that reliance upon it is entirely unreasonable. While the conclusion is not clear cut, the

> objectively apparent absence of probable cause presented in Special Agent Hanson's affidavit here warrants suppression under *Leon*. App. 31.

The court noted that such affidavits could cause searches of the homes of everyone ever targeted by unsolicited e-mails:

> As it appears, little in the affidavit distinguishes Pappas from any other citizen who received unsolicited email. App. 31.
>
> . . .
>
> The good faith exception could not have been designed to save searches stemming from a warrant affidavit so objectively lacking in probable cause. App. 32.

The Government filed a motion for reconsideration of the Order Adopting the Recommendation of the Magistrate Judge and Granting the Defendant's Motion to Suppress ("Order"). App. 12. The district court denied that motion. *Id.* 12-13.

The Government appealed the Order and the Seventh Circuit reversed in *United States v. Pappas*, 592 F.3d 799 (7th Cir. 2010). App. 1-11.

Petitioner now seeks this Court's review on certiorari. Petitioner requests that this Court grant the

writ of certiorari and set the case for plenary briefing and consideration.

REASONS FOR GRANTING THE WRIT

The opinion of the United States Court of Appeals for the Seventh Circuit contravenes this Court's long-standing holdings on the Fourth Amendment's protections against unreasonable searches. Sup. Ct. R. 10(c).

The opinion is contrary to the holdings of the United States Courts of Appeals for the Third, Sixth, Eighth, Ninth and Tenth Circuits regarding the existence of probable cause involving unsolicited e-mail containing child pornography and the need for a "factual bridge" linking the suspect to a criminal profile. Sup. Ct. R. 10(a).

The opinion also erroneously resolves important questions which have not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

Issue I

The opinion in *Pappas* authorizes the search of everyone's computer who was targeted with unsolicited e-mails within the preceding several months – even when nothing indicates that he has any illegal interests; when no fact, act or behavior ties him to the alleged illegal conduct; when no evidence shows

that he opened the e-mails or viewed their content, much less subscribed to websites with illegal pictures or solicited such pictures; and even when he soon closes that e-mail address.

In this age of rampant unsolicited e-mails, virtually every e-mail user is subject to search, pursuant to the *Pappas* opinion.

In authorizing such indiscriminate searching, the opinion violates Fourth Amendment principles and conflicts with opinions of this Court and of the Sixth, Eighth, Ninth, and Tenth Circuits. Sup. Ct. R. 10(a), (c).

The Ninth Circuit in *United States v. Weber,* 923 F.2d 1338, 1345 (9th Cir. 1990), found two-year-old facts of answering an ad for child pornography insufficient for a finding of probable cause, even when lumped together with the collector's profile:

> On these facts, to find probable cause . . . would be to justify virtually any search of the home of a person who has once placed an order for child pornography – even if he never receives the materials ordered. *Id.*

Here the Ninth Circuit refused to authorize searches when no evidence of receipt of contraband existed, or of some act tying the accused to illegality.

The opinion of the Seventh Circuit squarely conflicts with the opinion of the Ninth Circuit in *Weber*.

In this age of rampant unsolicited e-mailing, the opinion would admit agents into every home and every computer targeted with illegal matter, even when there was no evidence of receipt or possession of contraband, and no act or conduct by the accused manifested illegal leanings.

Similarly, other circuits require evidence of some affirmative act or behavior by the suspect before finding a probability that evidence of possessing or receiving child pornography will be found on his computer.

In the Sixth Circuit, "evidence that a person has visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." *United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006).

The Eighth Circuit, in *United States v. Stulock*, 308 F.3d 922, 925 (8th Cir. 2002), held that "one cannot be guilty of possession [of child pornography] for simply having viewed an image on a web site . . . , without having purposely saved or downloaded the image."

In the Ninth Circuit, unwitting receipt of e-mail with contraband will not support probable cause because 18 U.S.C. §2252(a)(2) only criminalizes the

"knowing" receipt of contraband. A person "knowingly" receives and possesses pornography – without evidence of downloading – when he seeks it out and exercises dominion and control over it. *United States v. Romm*, 455 F.3d 990, 998 (9th Cir. 2006). *See also United States v. Gourde*, 440 F.3d 1056 (9th Cir. 2006) (even subscribing to a mixed pornography website did not alone support probable cause that the subscriber was a collector).

In the Ninth Circuit, unsolicited e-mails with child pornography only support probable cause when evidence of the accused's other behavior indicates that he was not an accidental target of such e-mails, but a willing, knowing recipient. *See United States v. Kelley*, 482 F.3d 1047 (9th Cir. 2007).

In the Tenth Circuit, evidence of a defendant's personal history, in combination with his receipt of e-mails containing child pornography, establishes probable cause. *United States v. Rice*, 358 F.3d 1268 (10th Cir. 2004), *overruled on other grounds by United States v. Rice*, 405 F.3d 1108 (10th Cir. 2005). Without the additional evidence of the accused's unusual interest in young children, the affidavit would be insufficient. *Id.*

Only the Seventh Circuit upholds the search of a computer based on e-mailed, unsolicited adult and child pornography when the affidavit in support of the warrant alleges nothing indicating the accused's interest in child pornography or his receipt of it, and nothing showing that his account was not targeted by

accident or in a blind "marketing" effort – not one act, not one fact, not one circumstance.

Because it only alleged that e-mails with child and adult pornography were sent to Petitioner's e-mail address some eighteen months prior, Hanson's affidavit would have been found insufficient in the Sixth, Eighth, Ninth and Tenth Circuits.

Such discrepant results in different circuits provide grounds for granting certiorari in this case. Sup. Ct. R. 10(a).

In authorizing computer searches when the affidavit supports only a weak chance of finding child pornography (rather than a "fair probability" or "substantial chance," *Illinois v. Gates*, 462 U.S. 213, 238 (1983)), when the agent cannot show that the e-mail account was not targeted by accident or by insidious or brazen pushing of an illegal product, the Seventh Circuit's opinion annuls the Fourth Amendment's "probable cause" protections. *See Illinois v. Gates*, 462 U.S. at 238; *Ornelas v. United States*, 517 U.S. 690, 696 (1996) ("probable cause to search" exists when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found"); *United States v. Cortez*, 449 U.S. 411, 417-418 (1981) (probable cause exists when there is "a particularized and objective basis" for suspecting the

person of criminal activity). This too is a ground for granting certiorari in this case. Sup. Ct. R. 10(c).

Only this Court can correct the Seventh Circuit's erroneous interpretation of the Fourth Amendment in *Pappas*. Sup. Ct. R. 10(a), (c). Correcting that interpretation would revive and make uniform the Fourth Amendment's protections of our "comprehensive right of personal liberty in the face of governmental intrusion." *See Lopez v. United States*, 373 U.S. 427, 454-455 (1963).

Issue II

Contrary to this Court's holdings in *United States v. Leon*, 468 U.S. 897 (1984), and in cases flowing from *Leon*, the Seventh Circuit's opinion in *Pappas* replaces the objective and neutral standards of the Fourth Amendment's "probable cause" jurisprudence with the subjective judgment of a prosecutor. Sup. Ct. R. 10(c).

The opinion eviscerates the Fourth Amendment by endorsing searches initiated and executed by careless, uninformed, overzealous or unscrupulous agents who secure prosecutors' subjective approval of affidavits objectively devoid of probable cause.

The *Leon* exception can be invoked only where the good faith of the affiant or the searching officer was "objective" and when the affidavit makes a "colorable showing of probable cause." *United States v. Leon*, 468 U.S. at 908, 918-919, n.20 ("We emphasize

that the standard of reasonableness we adopt is an objective one") (*citing Illinois v. Gates*, 462 U.S. at 261, n.15) (White, J., concurring in the judgment).

It is well established – by the holdings of this Court and of Courts of Appeals – that the inquiry is objective, assuming the neutrality of a judicial official and a reasonable officer's knowledge of what the law requires. *United States v. Leon*, 468 U.S. at 918-919, n.20; *United States v. Koerth*, 312 F.3d 862, 871 (7th Cir. 2002) (*quoting United States v. Howe*, 848 F.2d 137, 140 (9th Cir. 1989)).

The Seventh Circuit's opinion supplants the judicial neutrality/"reasonable officer" standards with the subjective judgment of a federal prosecutor, who is in the "competitive enterprise of ferreting out crime." *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (*citing Johnson v. United States*, 333 U.S. 10, 14 (1948)).

Prosecutorial approval may increase an agent's *subjective* good faith that probable cause exists. However, a reasonable agent would not believe that a prosecutor's subjective judgment would cure an affidavit which objectively lacks probable cause.

The rationale behind the *Leon* exception is that a reasonable agent should be able to rely on the opinion of an impartial judicial officer, the magistrate judge. *Leon,* 468 U.S. at 917 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of

particular criminal prosecutions."); *see also Illinois v. Krull*, 480 U.S. 340, 365 (1987) (Justices O'Connor, Brennan, Marshall and Stevens dissenting) ("[T]he *Leon* Court relied explicitly on the tradition of judicial independence," so the exception applied when judicial error resulted in the issuance of a warrant, even when no probable cause existed) (*quoting Leon*, 468 U.S. at 917).

Prosecutors are not impartial. They are not just "adjuncts to the law enforcement team." *Leon*, 468 U.S. at 917. They are the law enforcement team. They have "a stake in the outcome of particular criminal prosecutions." *Id.* Their role mandates not just "concern," but a presumption that prosecutors *would* "take the opportunity presented by the good-faith exception to authorize unconstitutional searches." *Illinois v. Krull*, 480 U.S. at 365.

This Court's underlying rationale behind the *Leon* exception is utterly inapplicable to prosecutors who would "authorize unconstitutional searches," *id.*, because they lack the "requisite neutrality" to give an unbiased judgment on the sufficiency of an affidavit in a case they will prosecute. *See Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) ("[T]he whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations . . . ") (referring to the classic statement of the policy underlying the warrant requirement of the Fourth Amendment by Justice Jackson, writing for the U.S. Supreme

Court in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).

The Seventh Circuit stands the *Leon* exception on its head, insofar as it finds that the agent acts in "objective good faith" when seeking a warrant and executing a search because when a federal prosecutor believes that a warrant should issue. *See* App. 5.

Equally flawed, in light of *Leon*, are those other opinions which uphold searches under the *Leon* exception supported by consultations with federal prosecutors. *See e.g. United States v. Bynum*, 293 F.3d 192, 198 (4th Cir. 2002); *United States v. Johnson*, 78 F.3d 1258, 1264 (8th Cir. 1996); *United States v. Brown*, 951 F.2d 999, 1005 (9th Cir. 1991); *United States v. Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990).

The Framers of the United States Constitution enshrined the protections against unreasonable searches in the Fourth Amendment to prevent their dismantling by groups with political or other agendas. *See Illinois v. Krull*, 480 U.S. at 365-366.

It follows that protections against unreasonable searches were meant to be protected from prosecutors, who have agendas and are subject to political pressures. Hence, prosecutors may not be the arbiters of the constitutional sufficiency of a search. Their opinions cannot support "objective good faith" in the propriety of a search.

Only this Court can curtail this aberrant application of the *Leon* exception where the officer's "objective good faith" supposedly rests on the subjective opinion of a prosecutor. This Court should ensure that the Framers' intent behind the Fourth Amendment is carried out and that the *Leon* exception functions as intended.

Issue III

The Seventh Circuit's opinion in *Pappas* holds constitutionally sufficient affidavits reciting a criminal profile, but alleging nothing – no facts, acts or behavior of the suspect – indicating that the suspect fits the profile.

This is contrary to the Fourth Amendment principles and to the holdings of this Court and of the Courts of Appeals in other circuits. Sup. Ct. R. 10(a), (c).

Pursuant to this opinion, an affidavit will be found sufficient (and the search will be upheld) even if the drafting agent does not recite any facts, acts or behavior of the suspect that match the profile; when the criminal profile – a generalization from the conduct of others, not of the suspect – would be the sole basis of probable cause.

This violates the Fourth Amendment, as interpreted by this Court: "The Fourth Amendment requires government to respect 'the right of the people to be secure in their persons . . . against unreasonable

searches and seizures.' This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997).

Searches stemming from such affidavits are the "fishing expeditions" which the Fourth Amendment was designed to eliminate. *See Lopez v. United States*, 373 U.S. 427, 454-455 (1963) (tracing the Fourth Amendment's ban on unreasonable exploratory searches back to *Entick v. Carrington*, 19 Howell's State Trials 1029 (C. P. 1765), and identifying, as a key principle of the Fourth Amendment, "a comprehensive right of personal liberty in the face of governmental intrusion."); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) ("investigatory" searches done "in the hope that something might turn up" are prohibited); *see also Texas v. Gonzales*, 388 F.2d 145, 148 (5th Cir. 1968); *United States v. Marrese*, 336 F.2d 501, 504 (3d Cir. 1964) (" . . . in the absence of circumstances justifying 'contemporaneous searches' as defined in *Preston v. United States*, [376 U.S. 364 (1964)], local police, or their federal counterpart, cannot engage in 'fishing expeditions' in violation of the 4th Amendment guarantees proscribing 'unreasonable searches and seizures.'").

The underlying affidavit in Petitioner's case – with its utterly un-individualized profile – was nothing but a wide drag-net in the government's fishing expedition for evidence.

This Court made the specific factual "bridge" between a profile and the suspect a constitutional requirement in holding that probable cause exists only "where the known facts and circumstances [of the accused] are sufficient to warrant a man of reasonable prudence in the belief that" evidence of the suspect's crime will be found. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

At least two Courts of Appeals expressly require more than recitations of criminal profiles and find insufficient affidavits that do not state what specific acts of the accused place him within the profiled group.

The Third Circuit held that boilerplate, generic descriptions of criminal conduct fall short of probable cause, and that, to have any value, expert opinions must be tailored to the specific facts of the case. *United States v. Zimmerman*, 277 F.3d 426, 433 n.4 (3d Cir. 2002).

The Ninth Circuit held that probable cause did not exist when the agent's inferential leaps left the realm of probability and stooped to possibility, even chance; and when there was no factual foundation to show that the suspect was a member of the profiled criminal class. *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990). The Ninth Circuit requires that "the affidavit must lay a foundation which shows that the person subject to the search is a member of the class." *Weber*, 923 F.2d at 1345. *See also United States v. Gourde*, 382 F.3d 1003, 1013 (9th Cir. 2004) (there

must be a nexus, an act by the accused specifically tying the accused person's conduct to the profile).

In the Ninth and Third Circuits, agent Hanson's affidavit would have been ruled lacking in probable cause because it recited no act or behavior on Petitioner's part that is typical of the profiled collectors of child pornography; indeed, it recited no suspicious act or behavior by Petitioner.

In contrast, in the Seventh Circuit, pursuant to the *Pappas* opinion, an affidavit with a bare generic profile satisfies probable cause requirements, when the sole act alleged about the suspect is that he had one e-mail account, to which unsolicited illegal images were sent.

This Court must ensure that this inter-circuit variance does not persist, Sup. Ct. R. 10(a); and that the Seventh Circuit follows this Court's Fourth Amendment jurisprudence, Sup. Ct. R. 10(c).

CONCLUSION

Contrary to the core Fourth Amendment principles and to the holdings of this Court and of other Courts of Appeals, the United States Court of Appeals for the Seventh Circuit has authorized searches of virtually every citizen's computer which, in this age of unsolicited e-mailing, was the target of unsolicited e-mails containing child and adult pornography. Sup. Ct. R. 10(a), (c).

The Seventh Circuit's opinion in *Pappas* upheld the existence of probable cause although nothing in the affidavit indicated Petitioner's inclination to commit, or connection to, the suspected crime. Petitioner became a suspect solely because illegal content was e-mailed, unsolicited, to his computer.

The Seventh Circuit thus makes a suspect of virtually every e-mail user, allowing the government to search every e-mail user's computer.

This Court should settle the questions, so vital in this age of unsolicited e-mailing: (1) whether the fact that someone's e-mail address was targeted with illegal, unsolicited matter some eighteen months prior supplies probable cause for the search of his/her computer?, and (2) whether a prosecutor's approval can support "objective good faith" on an agent's part? Sup. Ct. R. 10(c).

The Seventh Circuit held that prosecutorial approval of the underlying affidavit supplies the searching officer with "objective good faith belief" in the existence of probable cause, although evidence linking the suspect to child pornography, to the contraband e-mails, or their sender is utterly absent. Thus, the Seventh Circuit's Opinion effectively replaces the objective and neutral standards of the Fourth Amendment's "probable cause" jurisprudence with the subjective judgment of a prosecutor. This Court has not settled the issue of prosecutorial approval of affidavits, and it should do so now. Sup. Ct. R. 10(a), (c).

For all the reasons stated above, pursuant to Sup. Ct. R. 10, this Court should grant the writ of certiorari and set the case for plenary briefing and consideration.

Respectfully submitted,

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In the

United States Court of Appeals

for the Seventh Circuit

No. 09-1595

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

TED L. PAPPAS,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 08 CR 52 – **Charles N. Clevert, Jr.**, *Chief Judge.*

ARGUED OCTOBER 8, 2009 – DECIDED JANUARY 21, 2010

Before EASTERBROOK, *Chief Judge*, and MANION and TINDER, *Circuit Judges.*

MANION, *Circuit Judge.* Ted Pappas was indicted for possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Pappas pleaded not guilty and filed a motion to suppress evidence seized during a search of his home, as well as statements he made during the execution of the search warrant. The district court granted Pappas's motion to suppress. The government appeals. We reverse.

I.

In May 2005, law enforcement officers in California executed a search warrant on Michael Golubski's America Online email account. The search revealed that between April and May 2005, Golubski used the email name "ExhibMale39" to send seventeen emails to "longtalks@aol.com," including eleven that contained images of child pornography. Further investigation revealed that the email account "longtalks@aol.com" belonged to Ted Pappas, although in June 2005, Pappas changed his email account to TedP5785@aol.com.

Federal agent Elizabeth Hanson provided this information to an Assistant United States Attorney, and the two discussed the propriety of obtaining a search warrant for Pappas's home. After concluding there was probable cause to obtain a search warrant, Agent Hanson presented a search warrant application and a nine-page affidavit to a magistrate judge. Hanson's affidavit included a summary of her professional experience investigating child pornography. Specifically, Hanson stated that she had ten years' experience investigating sexual exploitation of minors and had conducted numerous forensic examinations of computers in child pornography investigations. Hanson also described the typical behavior of individuals who collect, procure and distribute child pornography. She further detailed the emails sent to Pappas, stating that over a three-week period, Pappas had received eleven emails that included child pornography. Hanson also included a

description of the pornographic images of children contained in three of the eleven email transmissions. Additionally, Hanson noted that Pappas continued to maintain an email account, using the name TedP5785@aol.com.

In November 2006, based on the search warrant application and Hanson's affidavit, a federal magistrate judge issued a search warrant for Pappas's residence. According to the government, during the search, Pappas spoke with agents and admitted he used the screen name "longtalks" to trade adult pornography in chat rooms and via email. He also admitted receiving images and videos of children engaged in sexually explicit conduct, but claimed he had deleted those images. A search of Pappas's computer hard drive, however, uncovered images of child pornography. Agents also discovered that images of child pornography had been saved on a floppy disk but were later deleted; the government was able to recover the images.

Based on the evidence recovered during the search, a grand jury indicted Pappas on two counts of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Pappas pleaded not guilty and filed a motion to suppress the evidence seized during the search and the statements he made during the execution of the warrant. A magistrate judge recommended granting the motion to suppress, and the district court adopted that recommendation and suppressed the evidence seized and Pappas's statements. The government appeals.

II.

On appeal, the government argues that while it may be questionable whether probable cause supported the issuance of the search warrant, the evidence seized and Pappas's statements are nonetheless admissible under *United States v. Leon*, 468 U.S. 897 (1984).[1] In *Leon*, the Supreme Court articulated the good faith exception to the exclusionary rule, holding that evidence obtained in violation of the Fourth Amendment is nonetheless admissible if the officer who conducted the search acted in good faith reliance on a search warrant. *Id.* at 922-23. "That [an] officer[ ] obtained a warrant is prima facie evidence of good faith." *United States v. Elst*, 579 F.3d 740, 744 (7th Cir. 2009). A defendant may rebut the prima facie evidence of good faith

> by presenting evidence to establish that: (1) the issuing judge wholly abandoned his judicial role and failed to perform his neutral and detached function, serving merely as a rubber stamp for the police; (2) the affidavit supporting the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (3) the issuing judge was misled by information in an affidavit that the affiant

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[1] Because the government does not argue that there was probable cause to support the issuance of the search warrant, we need not address that question; instead our focus is on whether a reasonable officer could believe probable cause supported the issuance of the warrant.

> knew was false or would have known was false except for his reckless disregard of the truth.

Id. (internal quotations and citations omitted).

In this case, Pappas argues, and the district court held, that the affidavit supporting the warrant was so lacking in probable cause that the officers could not rely upon it in good faith.[2] We disagree. Here, the affidavit clearly documented evidence establishing that at least eleven images of child pornography had been sent to Pappas's email account and verifying that Pappas continued to maintain email access (thus indicating continued access to a computer on which child pornography could be stored). Additionally, prior to seeking a warrant, Agent Hanson consulted with an Assistant United States Attorney. Consulting "with the prosecutor prior to applying for [a] search warrant provides additional evidence of [that officer's] objective good faith." *United States v. Bynum*, 293 F.3d 192, 198 (4th Cir. 2002). *See also United States v. Johnson*, 78 F.3d 1258, 1264 (8th Cir. 1996) (stating that obtaining advice of a county attorney is an indication that an officer's reliance on a search warrant was objectively reasonable); *United States v. Brown*, 951 F.2d 999, 1005 (9th Cir. 1991) (noting "an officer's consultation with a government attorney is of significant

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[2] On appeal, Pappas does not contend that the issuing judge abandoned his judicial role or was misled by the affidavit.

importance to a finding of good faith . . . [and it is] of even greater importance where, as here, a point of law relating to the scope of a Fourth Amendment search and seizure was not yet settled at the time the warrant issued"); *United States v. Taxacher,* 902 F.2d 867, 872 (11th Cir. 1990) (explaining that officer's consultation "with the local district attorney before seeking the search warrant, and then submit[ting] the matter to a neutral magistrate" was "indicative of objective good faith").

In response, Pappas claims that the search warrant application was utterly lacking in probable cause because there is no evidence that Pappas solicited child pornography or that he even read the email messages. Rather, Pappas maintains that because he also received adult pornography from Golubski, the only reasonable inference flowing from the facts is that the emails to him were "advertisements" that do not indicate that he knowingly possessed child pornography. That may be one inference. But an officer could also reasonably believe that the number of email messages containing child pornography sent to Pappas, and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, was sufficient to establish probable cause for the crime of knowing possession of child pornography. Similarly, while Pappas maintains that the fact that he changed his email account demonstrates that he did not want to receive child pornography, equally plausible is the conclusion that Pappas changed his email account to

avoid detection. In fact, given that Pappas waited nearly three months after he received the first email from Golubski to change his email address, and that he received numerous images of child pornography from Golubski, the latter inference seems much more likely.

Pappas further argues that the search warrant application was completely lacking in indicia of probable cause because of the eighteen-month delay between the transmission of the emails (mid-2005) and the issuance of the search warrant (late 2006). While the recency of information contained in a search warrant application is one factor bearing on the question of probable cause, *United States v. Watzman,* 486 F.3d 1004, 1008 (7th Cir. 2007), there is no bright line for when information is stale. *United States v. Prideaux-Wentz,* 543 F.3d 954, 958 (7th Cir. 2008). Indeed, we recently held that while four-year-old transmissions of child pornography were too stale to provide probable cause, officers could nonetheless rely in good faith on a search warrant issued by a magistrate judge based on those transmissions. *Prideaux-Wentz,* 543 F.3d at 958-59.[3] Similarly, in this case, the officers reasonably could have relied on the

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[3] The government also cites our nonprecedential decision in *United States v. Doan,* 245 Fed. Appx. 550, 555 (7th Cir. 2007), wherein this court applied the good faith exception to a warrant based on child pornography transmitted seventeen months prior to the issuance of the warrant.

search warrant that was based on child pornography sent eighteen months earlier.

Pappas also argues that the officers could not reasonably rely on the warrant because the warrant application included boilerplate language concerning the practices of collectors of child pornography but did not include any evidence Pappas fit that profile. In support of his position, Pappas relies on this court's recent decision in *Prideaux-Wentz,* 543 F.3d 954. In *Prideaux-Wentz,* the defendant argued that the search warrant affidavit was defective because it only included boilerplate statements about child pornography collectors generally and completely "lacked any information that would indicate that he has the characteristics of a prototypical child pornography collector, and furthermore, that this gap renders any probable cause determination entirely unreasonable." *Id.* at 960. We noted in *Prideaux-Wentz* that an "affidavit must lay a foundation which shows that the person subject to the search is a member of the class." *Id.* (internal quotations omitted). However, we then held that "because the warrant connected Prideaux-Wentz to several email accounts responsible for uploading or possessing child pornography," it did not take "much of an inferential leap to conclude that Prideaux-Wentz might be a collector of child pornography." *Id.* at 961. Accordingly, we concluded that "[t]here was sufficient evidence to link the boilerplate statements regarding child pornographers to the specific characteristics of Prideaux-Wentz." *Id.* at 960.

Pappas's reliance on *Prideaux-Wentz* is misplaced for several reasons. First, he reads too much into that decision. While *Prideaux-Wentz* explained that a search warrant affidavit must lay a foundation showing that the target of the search is a member of the class identified in the warrant, there is no magic "profile" of child pornography "collectors" that must be attested to in a search warrant affidavit. In fact, the moniker "collector" merely recognizes that experts in the field have found that because child pornography is difficult to come by, those receiving the material often keep the images for years. There is nothing especially unique about individuals who are "collectors" of child pornography; rather, it is the nature of child pornography, i.e., its illegality and the difficulty procuring it, that causes recipients to become "collectors." *See Watzman*, 486 F.3d at 1008 (noting that the agent explained that "individuals who view child pornography typically 'maintain their collections for many years' and 'keep and collect items containing child pornography over long periods of time'"). Thus, as *Prideaux-Wentz* explained, where evidence indicates that an individual has uploaded or possessed multiple pieces of child pornography, there is enough of a connection to the "collector" profile to justify including the child pornography collector boilerplate in a search warrant affidavit. Similarly, here, because Pappas received eleven emails containing child pornography, inclusion of the child-pornography boilerplate was justified.

Pappas's reliance on *Prideaux-Wentz* is also misplaced because we decided that case after the search warrant in this case was issued. Thus, *Prideaux-Wentz* could not have called into question the good faith of the officers involved in the search of Pappas's residence. *See United States v. Adames*, 56 F.3d 737, 747 (7th Cir. 1995) (holding that "the officers could not have known that the warrant was invalid at the time it was executed because [the Supreme Court precedent relied upon by the defendant to invalidate the search warrant] was not decided until more than a year later"). Finally, *Prideaux-Wentz* held that while probable cause was lacking, the evidence seized was nonetheless admissible under the *Leon* good faith exception to the exclusionary rule. Similarly, the good faith exception applies here and saves from exclusion the evidence discovered during the search of Pappas's home and the statements he made during the execution of the search warrant.

III.

A magistrate judge issued a search warrant authorizing the search of Pappas's residence. Even if probable cause did not support issuance of this warrant, Agent Hanson demonstrated a prima facie case of good faith by obtaining a warrant in the first instance. Her efforts to consult with an Assistant United States Attorney prior to seeking a warrant further demonstrate her good faith. Although there was some delay between the transmission of child

pornography to Pappas and the issuance of the warrant, the delay was not so great as to overcome the presumption of good faith. Nor was there anything impermissible in including information related to the practices of child pornography "collectors," given that numerous images of child pornography were sent to Pappas. Accordingly, the district court erred in granting Pappas's motion to suppress. We REVERSE.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-CR-52

TED L. PAPPAS,

Defendant.

ORDER DENYING THE GOVERNMENT'S MOTION TO RECONSIDER (Doc. # 42)

On December 16, 2008, this court issued an order Adopting the Recommendation of the Magistrate Judge and Granting the Defendant's Motion to Suppress. (Doc. # 41.) Subsequently, the government filed a motion for reconsideration of that order. On January 26, 2009, and February 24, 2009, this court hear oral argument on the government's motion.

In sum, the court concludes that the government has not demonstrated that reconsideration is necessary to correct clear errors of law or fact or to present new evidence. *See United States v. Misiolek*, 2004 WL 830433, *1 (N.D. Ill. Apr. 16, 2004) (*citing United States v. Dombrowski*, 1994 WL 577259 (N.D. Ill. Oct. 18, 1994)). Therefore, this court's December 16, 2008, order stands, and the government's Motion to Reconsider is denied.

In addition to the reasons stated on the record, the court reiterates that the affidavit underlying the search warrant at issue fails to set forth facts

indicating that images attached to emails sent eighteen months earlier to longtalks@aol.com, a now defunct email address which was changed on June 28, 2006, would be found on a computer at the defendant's residence. To the contrary, the warrant affidavit notes that computer evidence is extremely vulnerable "to destruction though error, electrical outages, or other causes." No other averments tie the defendant to potentially illegal activity.

Therefore, with the above in mind,

IT IS ORDERED that the government's Motion to Reconsider (Doc. # 42) is denied.

Dated at Milwaukee, Wisconsin, this 27th day of February, 2009.

BY THE COURT

/s/ C. N. Clevert, Jr.

C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,
v.
TED L. PAPPAS,
Defendant.

CASE NO.
08-CR-52

HONORABLE CHARLES N. CLEVERT, JR.
PRESIDING DISTRICT COURT JUDGE
MILWAUKEE, WISCONSIN FEBRUARY 24, 2009

MOTION HEARING
HELD IN THE ABOVE-ENTITLED MATTER

APPEARANCES:

JONATHAN H. KOENIG
U.S. Attorney's Office
517 E. Wisconsin Ave.
Milwaukee, WI 53202
appearing for the Plaintiff.

ROBIN SHELLOW
The Shellow Group
324 W. Vine St.
Milwaukee, WI 53212
appearing for the Defendant.

Proceedings recorded by electronic recording, transcript produced by computer aided transcription.

[2] PROCEEDINGS

(Afternoon proceedings commenced at 3:58:14 p.m.)

THE CLERK: Case number 08-CR-52, United States versus Ted Pappas. This matter is scheduled for a continued hearing on the government's motion. May I have the appearances, please.

MR. KOENIG: Good afternoon, Your Honor. Assistant United States Attorney Jonathan Koenig appears on behalf of the United States of America.

THE COURT: Good afternoon.

MS. SHELLOW: Good afternoon, Your Honor. Robin Shellow on behalf of Ted Pappas, who appears in person.

THE COURT: Good afternoon to you as well. Since our last hearing I have looked over the documents on file in this matter and have paid additional attention to the affidavit upon which the government relied in obtaining the search warrant at issue in this matter.

In reviewing the affidavit it has become even clearer to this Court that an experienced agent would have concluded that the information supporting the request for a search warrant lacked probable cause and that the same was stale. As the Magistrate Judge noted, and I wish to emphasize at this time the e-mail address for Mr. Pappas at the time the subject e-mails from California were sent was longtalks, an e-mail

address which was deleted after the California e-mails were [3] sent. It was replaced by a second e-mail address, TedP5785@AOL.com.

It was not until November of the following year that the government sought and obtained a search warrant which resulted in the issuance of charges in this case. That such a long period of time had passed and a new e-mail account was held by Mr. Pappas leads the Court to conclude, as the Magistrate Judge concluded, that this case should not go forward with the evidence which was secured from Mr. Pappas's computer.

Now, I say all that before getting to the crucial point in this matter, and that is the government has not to this Court's satisfaction demonstrated that a clear error has occurred in the Court's previous ruling. Hence, the Court's December 16th order in this matter shall stand and the government's motion for reconsideration shall be entered, shall be denied. An appropriate order consistent with this finding will enter forthwith.

In light of that, where does the government stand with respect to the prosecution of this case?

MR. KOENIG: Well, first of all, Your Honor, thank you for your careful attention to the motion to reconsider. As I indicated at the last time we were in court, it's an unusual thing for us to file such a motion and we appreciate the time you've given it. We do intend to seek an appeal in the very [4] short near future.

THE COURT: Not surprising. In light of that, how quickly do you anticipate submitting your paperwork?

MR. KOENIG: I would anticipate filing a notice of appeal later this week or early next week.

THE COURT: That being so, obviously it would not be appropriate for this matter to proceed. Would you agree, Miss Shellow?

MS. SHELLOW: Yes.

THE COURT: Therefore, if an appeal is filed all proceedings in this case shall be stayed pending directions from the Seventh Circuit. The conditions of release shall, however, remain in place.

Is there anything else to be addressed at this time?

MS. SHELLOW: Yes, Judge, I do have an addition, a request with respect to the conditions of release. Mr. Pappas has been completely compliant with all of the conditions of release.

His wife is from the Philippines and there is a family wedding there in April. Mr. Pappas would like to have his passport back and the Court's permission to travel to the wedding and then to return and then return the passport.

He has taken several business trips and several personal trips that have all been approved in advance, and he has always returned timely and kept probation apprised of all [5] of the events.

And because it's likely to be a quite lengthy or at least a somewhat lengthy stay of these proceedings, and because the Philippines were not chosen or are arbitrary but simply because his wife's family lives there, and I believe it's his niece is getting married, he would very much like to attend that wedding.

THE COURT: What is the government's position respecting travel?

MR. KOENIG: Your Honor, it is an unusual request, but I think given Mr. Pappas's track record to date I would likely not oppose the request. My usual practice is to consult with the probation officer who's assigned and see if they have any insight.

THE COURT: Well, guess what, I will nonetheless be consulting with the probation officer.

MR. KOENIG: Sure, they work for you, not me. But you asked for our position and I usually before I formulate a position I like to see what's going on.

THE COURT: Well, I will say this. If, ordinarily I will not address matters of bail in these cases that are before the Court unless there's some reason not to refer the case back to the Magistrate Judge. And so what I will do is address, have the Magistrate Judge address the issue of bail with due regard for whether or not Mr. Pappas has violated any of the [6] conditions of release.

When is the wedding again, Miss Shellow?

MS. SHELLOW: I think it's the third week in April. We would be happy to bring a motion before the Magistrate Judge. I just simply thought because we were here –

THE COURT: Just because of our protocol

MS. SHELLOW: Not a problem.

THE COURT: – I think it probably would be better to have the Magistrate Judge make the decision respecting bail. That way we keep things in sync and there won't be any change in expectations with regard to the enforcement of the conditions of bail.

So if you don't get a ruling before the Magistrate Judge then, of course, you can come back here. But ordinarily this Court would await a ruling from the Magistrate Judge and allow you to appeal if you take exception to what is determined. All right.

MS. SHELLOW: Yes, Your Honor. And I appreciate the Court's input. The only reason I brought it up here was because it was an unusual request, it was out of the country, and I didn't know if because of that it should be –

THE COURT: Well, we've had travel before

MS. SHELLOW: Okay.

THE COURT: – during these matters, and so while it's not unusual it's not exceptional.

[7] MS. SHELLOW: Thank you.

THE COURT: All right.

MS. SHELLOW: Thank you.

THE COURT: Thank you very much.

MR. KOENIG: Thank you, Your Honor.

THE COURT: Have a good evening.

(Afternoon proceedings concluded at 4:07:27 p.m.)

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[8] UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

I, Cynthia M. Bohman, RMR, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, Milwaukee, Wisconsin, do hereby certify that I transcribed the foregoing proceedings, and that the same is complete and accurate to the best of my ability and in accordance with the audio file as provided to me.

/s/ Cynthia M. Bohman
Official Court Reporter

Dated this 10th day of June, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-CR-52

TED L. PAPPAS,

Defendant.

ORDER ADOPTING THE MAGISTRATE JUDGE'S RECOMMENDATION (Doc. # 34), GRANTING DEFENDANT'S MOTION TO SUPPRESS (Doc. # 25), AND SETTING FINAL PRETRIAL DATE

Defendant, Ted Pappas, is charged by indictment with two counts of knowingly possessing, shipping, and transporting in interstate commerce matter containing visual depictions involving the use of minors engaging in sexually explicit conduct, contrary to 18 U.S.C. § 2252(a)(4)(B). He has filed a motion to suppress evidence obtained and connected with the execution of a search warrant issued November 27, 2006. Magistrate Judge Patricia Gorence issued a Recommendation October 21, 2008, that this court grant Pappas' motion to suppress. The government timely filed an objection to Judge Gorence's Recommendation.

On dispositive matters and certain other matters enumerated in 28 U.S.C. § 636(b)(1)(A), including motions to suppress evidence, a magistrate judge may only propose findings and make recommendations.

28 U.S.C. § 636(b)(1)(A), (B); Fed. R. Crim. P. 59(b)(1). A district court must review de novo the recommendations of the magistrate judge to which a party timely objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Crim. P. 59(b)(2), (3). However, portions of a recommendation to which no party objects are reviewed for clear error. *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). Thus, the de novo standard of review applies only to matters on which a party objects to a magistrate judge's recommendation (rather than an order) on the issues set forth in § 636(b)(1)(A) and Fed. R. Crim. P. 59(b)(1).

In this case, Pappas argues that the search warrant for his residence was issued improperly because the affidavit submitted by Immigration and Customs Enforcement Special Agent Elizabeth Hanson failed to establish probable cause. In her affidavit in support of the warrant, Special Agent Hanson explained that ICE agents in San Diego executed a search warrant in May 2005 at Michael Golubski's residence.[1] Analysis of Golubski's computers revealed that he had sent and received numerous emails with attachments containing child pornography using the email addresses "Exhibmale39@aol.com" and

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[1] It turns out that the emails sent by Golubski to "longtalks@aol.com" were discovered as a result of a search of Golubski's AOL account, not his residence. This issue was raised by the parties and discussed by Judge Gorence in her Recommendation. However, it is not relevant to the government's objections.

"bob4funscal@yahoo.com." Between April 5, 2005, and May 1, 2005, Golubski sent seventeen emails with image or movie attachments to "longtalks@aol.com." Special Agent Hanson noted that she viewed the seventeen emails: eleven included images or movie attachments depicting child pornography, five included adult pornography, and one included a girl of "questionable age." She described in the affidavit details of three of the illegal images sent to "longtalks@aol.com."

The affidavit went on to note that AOL records indicate that "longtalks@aol.com" is registered to Pappas, and that on June 28, 2008, Pappas deleted the "longtalks" address. After that date, his email address became "TedP5785@aol.com." Special Agent Hanson further averred that Pappas was arrested twice in 1980. He was arrested for disorderly conduct, a charge that was eventually dismissed. He was also arrested and convicted on a burglary charge for which he was sentenced to twelve years probation. The affidavit then listed Pappas' daytime and evening telephone numbers, his driver's license number, date of birth, confirmation of his residential address in Wauwatosa, and evidence of his employment.

Special Agent Hanson also included in the affidavit information on profiles of persons who collect child pornography. Based on her training and experience, she addressed the typical behavior and mind-set of pedophiles, noting that individuals who collect images of child pornography "rarely, if ever, dispose of or alter such materials." The affidavit

states that the "dramatically increased storage capacity of home computers" permits retention of image files for long periods of time, often up to three years, and that "individuals who collect, procure, and/or distribute images of minors engaged in sexually explicit conduct via the computer" often maintain names of websites and email addresses of persons with similar interests. It goes on to note the process for evidence collection in such investigations. Finally, it states the place to be searched and items to be seized.

On November 27, 2006, based on the information provided by Special Agent Hanson, Magistrate Judge William E. Callahan authorized the search of Pappas' home. The warrant was executed the next day, November 28, 2006. Pappas moves to suppress all evidence obtained during, or in connection with, the execution of that search warrant.

In his motion, Pappas argues that the affidavit merely claims that unsolicited emails were sent to "longtalks@aol.com," and that there is no indication that he solicited, received, opened, or possessed images of child pornography. In considering Pappas' motion to suppress, Judge Gorence concluded that, under the totality of circumstances, probable cause was lacking. She noted that there was no evidence that Pappas ever communicated with Golubski prior to or after the receipt of the emails, no evidence that Pappas solicited the emails sent by Golubski, and that the affidavit failed to provide any information that Pappas is a child pornography collector. Analyzing

these facts in light of the Seventh Circuit's recent decision in *United States v. Prideaux-Wentz,* 543 F.3d 954 (7th Cir. 2008), Judge Gorence held that without more, the evidence was insufficient and stale.

Judge Gorence further concluded that the "good faith exception" recognized in *United States v. Leon,* 468 U.S. 897 (1984), did not validate the search. In its objections to the Recommendation, the government concedes that probable cause for issuance of the warrant may have been lacking, but asserts that Judge Gorence erred in her application of *Leon's* "good faith exception" to the facts of this case.

A search pursuant to a warrant found wanting for probable cause can nonetheless be upheld if the officers reasonably relied on the magistrate judge's probable cause determination. *See Leon,* 468 U.S. at 923; *see also Jones v. Wilhelm,* 425 F.3d 455, 464 (7th Cir. 2005) ("Even if a warrant is ultimately found to be unsupported by probable cause or lacking in particularity, searches conducted pursuant to the warrant may be valid under the good-faith exception set forth in *United States v. Leon,* 468 U.S. 897, 926 (1984)."). "For a warrant search to qualify for the good-faith exception, however, the officers conducting the search must have manifested an objective good-faith belief in the validity of the warrant." *Jones,* 425 F.3d at 464.

"'An officer's decision to obtain a warrant is prima facie evidence that he or she was acting in good faith.'" *Prideaux-Wentz,* 543 F.3d at 959 (quoting

United States v. Olson, 408 F.3d 366, 372 (7th Cir. 2005)). "A defendant may rebut this prima facie case by presenting evidence establishing either that: (1) the warrant issuing officer 'wholly abandoned his judicial role' and failed to 'perform his neutral and detached function,' serving 'merely as a rubber stamp for the police'; or (2) the affidavit submitted in support of the warrant was 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Olson*, 408 F.3d at 372 (quoting *Leon*, 468 U.S. at 923); *see also United States v. Woolsey*, 535 F.3d 540, 546 (7th Cir. 2008) (discussing *Leon*). As to the latter, a court's inquiry is "whether the officer could have reasonably believed that the materials presented to the magistrate judge (either in an affidavit or in some other respect such as testimony from the police officers) were sufficient to establish probable cause." *United States v. Koerth*, 312 F.3d 862, 869 (7th Cir. 2002).

Here, Judge Gorence concluded that the good faith exception did not apply because the search warrant affidavit "was so lacking in probable cause as to render official belief in its existence entirely unreasonable." (Rec. 15.) Judge Gorence focused on the affidavit's implied conclusion that Pappas fit the profile of an individual who collects child pornography. She noted that the affidavit contained mere boilerplate language regarding "collector profiles" without any connection to Pappas or the circumstances of the case. As stated in the Recommendation, "the affiant, as an experienced agent, should reasonably have

concluded that the defendant did not meet the collector's profile and, therefore, that the affidavit in support of the warrant did not establish probable cause." (*Id.*)

This court has reviewed the Recommendation, the government's objections, and the relevant materials, and agrees with Judge Gorence's conclusion. First, there is not a whit of evidence in the affidavit indicating that Pappas fit a collector profile despite the boilerplate recitations included in the affidavit. *See United States v. Weber*, 923 F.3d 1338, 1345 (9th Cir. 1990). Unlike *Prideaux-Wentz*, there is no evidence that Pappas uploaded illegal images, participated in internet forums, or in any way controlled the illegal images at issue. Thus, a reasonable agent should have concluded the affidavit lacks the necessary bridge connecting boilerplate averments about collectors of child pornography to Pappas. *Cf. Prideaux-Wentz*, 543 F.3d at 961 ("Because the warrant connected Prideaux-Wentz to several email accounts responsible for uploading or possessing child pornography, we cannot say that it required too much of an inferential leap to conclude that Prideaux-Wentz might be a collector of child pornography. There was a bridge connecting the general averments contained in Agent Paulson's affidavit to Prideaux-Wentz: jackinpulpit2001. The user name "jackin pulpit2001" was tied to Prideaux-Wentz and this ID was responsible for uploading a fair number of child pornography images.").

Because the affidavit fails on its face to connect Pappas to the child pornography collector profile, any reliance on collectors' tendency to retain possession of illegal images for long periods of time is inappropriate. In other words, it does not follow that simply injecting boilerplate collector profile language into an affidavit so otherwise lacking in probable cause necessarily permits obvious staleness concerns to be ignored given similar time intervals was permitted in other "child porn" cases. Frankly, eliminating the inappropriate "collector profile" language from the affidavit leaves nothing indicating that evidence of receipt or possession of child pornography would likely exist at Pappas' residence.[2] Thus, the government's

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[2] The government asserts that Special Agent Hanson's affidavit mentions the "dramatically increased storage capacity" of modern personal computers, thus supporting the "fair probability" that illegal images would be located at Pappas' residence. However, the affidavit language is specifically couched in the collector profile section to illustrate the means by which collectors hold onto child pornography because such images are "treated as prized possessions." (Aff. ¶ 24(C).) As the government acknowledges, the affidavit lacks averments that the technology itself automatically retains the email images such that an eighteen month gap is no hurdle to the recovery of sought evidence. In any event, in the absence of affirmative actions by Pappas, such a contention would not necessarily create the "fair probability" (or reasonable belief therein) required to justify a search of Pappas' residence under the Fourth Amendment. *Cf. United States v. Gourde*, 440 F.3d 1065, 1067-69 (9th Cir. 2006) (discussing longevity of downloaded images on computer hard drives as supporting the "fair probability" that illegal images would be recoverable from the computer of a defendant who

(Continued on following page)

contention that the evidence should be suppressed because the "search warrant was sought against the backdrop of Seventh Circuit caselaw emphasizing the absence of any 'bright line' rule for determining staleness in child porn cases" is unpersuasive. *Cf. United States v. Newsom,* 402 F.3d 780, 783 (7th Cir. 2005) (discussing staleness in child pornography cases but noting that "the police did not base the search warrant on the year-old pornographic images alone; they also relied on Edwards's recent discovery of the tape of her daughter").

Relatedly, the government submits that *Prideaux-Wentz* cannot be applied to this case because it was issued after the warrant was sought and changed the standard for reliance on "collector profile" language in warrant affidavits. However, the court fails to see how *Prideaux-Wentz's* discussion of the applicable standard constitutes a retroactive application of a new "standard." First, among other cases, *Prideaux-Wentz* cites to *United States v. Weber,* 923 F.2d 1338, a 1990 case issued by the Ninth Circuit. Nothing suggests that *Weber* is an any way inconsistent with previous Seventh Circuit cases on point, and nevertheless, the applicable standard discussed in both cases stands on innate Forth Amendment principles. "In order to rely on profiles, 'the affidavit must lay a foundation which shows that the person subject to the

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"took steps to affirmatively join" (via paid subscription to) a child pornography website featuring downloadable files).

search is a member of the class.'" 543 F.3d at 960 (quoting *Weber*, 923 F.3d at 1345). "Furthermore, 'rambling boilerplate recitations designed to meet all law enforcement needs' do not produce probable cause.'" *Id.* (quoting *United States v. Zimmerman*, 277 F.3d 426, 433 n.4 (3d Cir. 2002)). The government's argument on this point rests on the untenable assumption that at the time the affidavit was drafted, the simple recitation of boilerplate collector profile information without any evidence that the defendant fit such a profile gave rise to probable cause.

Finally, the government maintains that suppression of evidence in this case would be inconsistent with the purposes of the exclusionary rule. It points to *Leon*, which notes that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Leon*, 468 U.S. at 918. The general purpose of the exclusionary rule is to "alter the behavior of individual law enforcement officers or the policies of their departments." *United States v. Harju*, 466 F.3d 602, 606 (7th Cir. 2006) (quoting *Leon*, 468 U.S. at 918); *see United States v. Peltier*, 422 U.S. 531, 539 (1975) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."); *Zimmerman*, 277 F.3d at 436 ("Because the 'purpose of the exclusionary rule is to deter unlawful police conduct,' the fruits of an

unconstitutional search should be suppressed if, despite the magistrate's authorization, an objectively reasonable, well-trained officer would have known that the search violated the Fourth Amendment." (quoting *Leon*, 468 U.S. at 919)). However, this argument can be circular inasmuch as *Leon* sets forth the exception applicable under the circumstances. The inquiry is objective and assumes a reasonable officer's knowledge of what the law prohibits. *See Leon*, 468 F.3d at 919 n.20. To that end, suppression is appropriate if the affidavit in support of the warrant so lacks indicia of probable cause that reliance upon it is entirely unreasonable. While the conclusion is not clear cut, the objectively apparent absence of probable cause presented in Special Agent Hanson's affidavit here warrants suppression under *Leon*.

As it appears, little in the affidavit distinguishes Pappas from any other citizen who received unsolicited email. The only fact connecting Pappas to child pornography in the warrant affidavit was that a third party emailed illegal images eighteen months earlier to an account once registered to Pappas but since deleted. Other information presented in the warrant – that Pappas maintains a different email account through AOL, one of the largest email service providers in the country; that Pappas was arrested over twenty years ago for burglary; that Pappas is employed, possesses a drivers license, and lives in Wauwatosa – is insignificant in the absence of any

affirmative steps taken by Pappas to access child pornography.[3] Further, given the significant temporal gap between Golubski's actions and the date Special Agent Hanson sought the warrant, and no intermittent activity bolstering probable cause or refreshing the underlying information, a reasonable agent would know the (scant) information presented in support of a search warrant was wholly insufficient and stale. *Cf. Prideaux-Wentz*, 543 F.3d at 961; *see generally United States v. Spry*, 190 F.3d 829, 836 (7th Cir. 1999) (discussing staleness); *United States v. Pless*, 982 F.2d 1118, 1125-26 (7th Cir. 1992) (same). The good faith exception could not have been designed to save searches stemming from a warrant affidavit so objectively lacking in probable cause. *Cf., e.g., United States v. Curry*, 538 F.3d 718, 730 (7th Cir. 2008) ("The officers here would have had no reason to question the warrants because, as we have described, the affidavit referred to significant circumstantial evidence that indicated that Mr. Curry may have been

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[3] Indeed, it is the lack of information in the affidavit that distinguishes this case from others in which probable cause was either found to exist or the good-faith exception saved the search. For example, the affidavit lacks any allegation that Pappas solicited or expected to receive any communication (let alone child pornography) from Golubski or any other source, that Pappas had any prior contact with Golubski, that Pappas acknowledged receipt of Golubski's emails, that Pappas opened the emails, or that Pappas frequented any internet forums. Further, there is no allegation that some other source – a cyber tip, a complaint, a witness, a criminal record – ties Pappas to child pornography.

the perpetrator of the robberies under investigation, and that the fruits and instrumentalities of that robbery may be located in his home or in his storage locker."); *Woolsey*, 535 F.3d at 548 ("Nor can we say that the affidavit is so plainly deficient that Babcock should have known that it would not amount to probable cause. Again, the document conveys considerable detail, including the extent to which Chastain and Babcock had corroborated Tuell's statements, the firsthand observations of Tuell, and the amount of time that had passed since Tuell saw the drugs."); *United States v. Sidwell*, 440 F.3d 865, 870 (7th Cir. 2006) ("[T]he controlled buy, the informant's description of Mr. Sidwell's apartment unit and the drug paraphernalia in the hallway outside of Mr. Sidwell's apartment provided Officer Hasse with, at a minimum, indicia of illegal drug dealing in that apartment. The officers' reliance on the warrant was therefore in good faith."). For the foregoing reasons,

IT IS ORDERED that the Magistrate Judge's Recommendation (Doc. # 34) is adopted.

IT IS FURTHER ORDERED that the defendant's motion to suppress evidence (Doc. # 25) is granted.

IT IS FURTHER ORDERED that the parties are to appear for a final pretrial conference on January 26, 2009, at 2:00 p.m. and for jury trial on February 2, 2009, at 8:30 a.m. in Courtroom 222, United States Courthouse, Milwaukee, Wisconsin.

Dated at Milwaukee, Wisconsin, this 16th day of December, 2008.

BY THE COURT

/s/ C. N. Clevert, Jr.
C. N. CLEVERT, JR.
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 08-CR-052

TED L. PAPPAS,

Defendant.

MAGISTRATE JUDGE'S RECOMMENDATION TO THE HONORABLE CHARLES N CLEVERT

NATURE OF CASE

On February 12, 2008, a federal grand jury sitting in this district returned a two-count indictment against defendant Ted L. Pappas. The defendant is charged in both counts with knowingly possessing, shipping and transporting in interstate and foreign commerce, matter containing visual depictions involving the use of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B). The indictment also contains a forfeiture provision.

On February 29, 2008, the defendant appeared before this court for arraignment, entering a plea of not guilty. Pursuant to the pretrial scheduling order issued at that time, the defendant has filed a motion to suppress all evidence obtained during, or in connection with, the execution of a search warrant issued November 27, 2006. (Docket #25). This motion will be addressed herein.

MOTION TO SUPPRESS ALL EVIDENCE

The defendant asserts that the search warrant for his residence in Wauwatosa, Wisconsin, was improperly issued based on an affidavit that failed to allege probable cause and, therefore, the search executed pursuant to that warrant violated his Fourth Amendment rights. In asserting that the affidavit in support of the search warrant failed to establish probable cause, the defendant maintains that it merely states that unsolicited e-mails were sent to the defendant and contains no facts that the defendant solicited, received, opened or possessed e-mail containing child pornography. He also contends that the core facts presented in the affidavit were insufficient to establish probable cause since there is no evidence in the affidavit that the defendant had any communication with Michael Golubski or sought child pornography from him or anyone else and, that, in fact, he deleted his screen name "longtalks" from his AOL account on June 28, 2005.

The defendant also contends that the facts in paragraph 24, which form the basis of the "Collector's Profile," are irrelevant to a finding of probable cause because the affidavit contains no facts indicating that the defendant was involved in the collection, procurement, or distribution of images of minors engaged in sexually explicit conduct. Therefore, the defendant asserts that he did not fit the "Collectors's Profile" set forth in paragraph 24

The defendant further asserts that the information in the affidavit regarding the e-mails was stale and, therefore, inadequate to establish probable cause for the search. He points out that the age of the information must be considered because the affidavit does not allege facts indicating any ongoing activity. The defendant seeks a *Franks*[1] hearing, contending that material misrepresentations and omissions regarding the facts invalidate the search warrant. Specifically, he asserts that the information in paragraph 16 that computer analysis of Mr. Golubski's computer revealed that he had sent 17 e-mails with image or movie attachments to the e-mail name, longtalks@aol.com, was false. Rather, the defendant asserts, and the government agrees, that the discovery of the 17 e-mails came from material obtained by agents after a search warrant was executed on Mr. Golubski's AOL account. Finally, the defendant asserts in his reply brief that the good faith exception recognized in *United States v. Leon*, 468 U.S. 897 (1984), does not save this warrant.

In opposing the motion, the government maintains that the affidavit in support of the search warrant, viewed in totality, establishes probable cause to search the defendant's residence. The government contends that, contrary to the defendant's assertion, it was not necessary to establish that the defendant

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[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

opened or solicited the e-mails. Rather, the government asserts: "For the search of the defendant's house to be reasonable, . . . the affidavit must have supported the inference that child pornography would be found there." (Government's Response to Motion to Suppress [Government's Response] at 8). The government maintains that the affidavit established probable cause to believe that child pornography would be found in the defendant's residence.

The government further asserts that probable cause was not stale at the time the search warrant was issued. Relying on the affiant's assertion that individuals who collect child pornography rarely dispose of such materials, the government states that the passage of 18 months between the time Mr. Golubski sent the e-mails to the defendant and the issuance of the warrant "was not such a long time that there was no longer a 'fair probability' that evidence of child pornography would be found on Pappas's computer." (Government's Response at 11). The government also asserts that a *Franks* hearing is not necessary because the defendant has failed to demonstrate intentional or reckless disregard for the truth in the affidavit in support of the search warrant. The government further states that even if the court were to conclude that the affidavit failed to demonstrate probable cause that evidence of a crime would be found in the residence, the good faith exception to the exclusionary rule as set forth in *Leon* is applicable and would prevent suppression of the evidence.

Analysis

At the outset, the court will address the defendant's request for a *Franks* hearing. The defendant asserts that he has met the standards for a *Franks* hearing because a statement in paragraph 16 of the affidavit submitted by Special Agent Hanson in support of the warrant is false. The defendant asserts, and the government concedes, that the discovery of the e-mails came from a search of Mr. Golubski's e-mail account, not from a search of his residence. The defendant contends that when the false statement is removed from the affidavit and the qualified omitted facts inserted, probable cause does not exist for the issuance of the search warrant for his residence.

Franks mandates that a search warrant be voided if a movant establishes by the preponderance of the evidence that:

1) A factual statement made in an affidavit supporting a warrant is false;

2) The affiant made the false statement either knowingly and intentionally or with reckless disregard for the truth; and,

3) Without the false statement, the remainder of the affidavit is insufficient to establish probable cause.

Franks, 438 U.S. at 155-56. To obtain a *Franks* hearing, a defendant must make a substantial preliminary showing of the three factors. *United States v. Merritt*, 361 F.3d 1005, 1010 (7th Cir. 2004), *vacated*

on other grounds, Merritt v. United States, 543 U.S. 1099 (2005). The focus of a *Franks* analysis is on the veracity of the affiant. *See United States v. Radtke*, 799 F.2d 298, 309 (7th Cir. 1986). "A substantial preliminary showing that the affidavit contained reckless or deliberate falsities and omissions must be followed by a substantial showing that the affidavit purged of those falsities and supplemented by the omissions would not be sufficient to support a finding of probable cause." *United States v. McNeese*, 901 F.2d 585, 596 (7th Cir. 1990), *overruled on other grounds by United States v. Westmoreland*, 240 F.3d 618 (7th Cir. 2001). Thus, a police officer violates the Fourth Amendment if he intentionally or recklessly submits untruthful statements in an affidavit used to obtain a search warrant. *Franks*, 438 U.S. at 155-56.

To prove deliberate falsehood or reckless disregard, a defendant "must offer direct evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting facts." *McNeese*, 901 F.2d at 594. A defendant seeking a *Franks* hearing bears a substantial burden to show probable falsity. *Id.*

In this case, the e-mails to the defendant were found as a result of a search of Mr. Golubski's America Online (AOL) account, not of Mr. Golubski's residence as Agent Hanson averred. The defendant asserts that this inaccuracy is significant because "California agents concealed from Agent Hansen (sic) that the e-mails from Michael Golubski to Pappas were found as a result of an AOL search because then

she would have known that Pappas never solicited any child pornography from Michael Golubski." (Defendant's Arguments and Memorandum of Law in Support of Motion to Suppress [Defendant's Memorandum] at 13). The defendant maintains that the California agents had in their possession the information that the defendant did not solicit any child pornography from Mr. Golubski and also could have known whether the defendant opened the e-mail messages he received from Mr. Golubski.

In their referral to Agent Hanson, the ICE agents in California correctly identified the source of the e-mails. (*See* Response to Motion to Suppress [Response], Exh. A at 3 [unnumbered]). The referral stated: "Based on information received from the search warrant to Internet Service Provider America Online, screen name/account longtalks@aol.com received suspected child pornography from GOLUBSKI." *Id.* Thus, this part of Agent Hanson's affidavit was not accurate. However, the defendant has failed to show that the inaccuracies and omissions were made knowingly or intentionally or with reckless disregard for the truth by either Agent Hanson or the Californian ICE Agents. *See McNeese*, 901 F.2d at 594. Agent Hanson merely made an error in preparing her affidavit or misunderstood the referral. Accordingly, the defendant has not shown that he is entitled to a *Franks* hearing.

With respect to the defendant's contention that the search warrant is not supported by probable cause, in determining whether probable cause exists

to support a warrant, the judge must consider the totality of the circumstances. *United States v. Brack*, 188 F.3d 748, 755 (7th Cir. 1999) (citing *Illinois v. Gates*, 462 U.S. 213, 238 [1983]). "The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *United States v. Newsom*, 402 F.3d 780, 782 (7th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 1455 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 [1983]).

"Probable cause is established when, based on the totality of the circumstances, the affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime." *United States v. Peck*, 317 F.3d 754, 756 (7th Cir. 2003). "Probable cause denotes more than mere suspicion, but does not require certainty." *McNeese*, 901 F.2d at 592 (quoting *United States v. Ellery*, 678 F.2d 674, 677 [7th Cir. 1982]).

"Probable cause does not require direct evidence linking a crime to a particular place. Instead, issuing judges are entitled to draw reasonable inferences about where evidence is likely to be found given the nature of the evidence and the type of offense." *United States v. Anderson*, 450 F.3d 294, 303 (7th Cir. 2006) (internal quotation marks and citations omitted). Thus, an "affidavit need not contain personal

observations that such evidence was kept at the residences." *McNeese,* 901 F.2d at 596. A judge making a probable cause determination "need not determine that the evidence sought is *in fact* on the premises to be searched . . . or that the evidence is more likely than not to be found where the search takes place. . . . [He] need only conclude that it would be reasonable to seek the evidence in the place indicated in the affidavit." *United States v. Malin,* 908 F.2d 163, 166 (7th Cir. 1990) (emphasis in original) (quoting *United States v. Peacock,* 761 F.2d 1313, 1315 [9th Cir. 1985]); *see also, United States v. Sleet,* 54 F.3d 303, 306 (7th Cir. 1995).

It is well-established that probable cause to search cannot be based upon stale information which no longer suggests that the items sought will be found in the place to be searched. Thus, in determining whether probable cause exists, the age of the information in the supporting affidavit is one factor to be considered and "it is less important when the criminal activity in question is apparently continuous." *United States v. Watzman,* 486 F.3d 1004, 1008 (7th Cir. 2007); *see also, United States v. Lamon,* 930 F.2d 1183, 1188 (7th Cir. 1991) (citation omitted) ("[W]here the affidavit recites facts indicating ongoing, continuous criminal activity, the passage of time becomes less critical."); *United States v. Chapman,* 954 F.2d 1352, 1373, n. 44 (7th Cir. 1992). If other factors indicate that the information is reliable and that the objects of the search are still on the premises, then

the magistrate judge should not hesitate to issue a warrant. *McNeese,* 901 F.2d at 597.

Additionally, a facially valid warrant issued by a neutral detached magistrate judge will be upheld if the police relied on the warrant in good faith. The decision to seek a search warrant is *prima facie* evidence that an officer was acting in good faith. *United States v. Wiley,* 475 F.3d 908, 917 (7th Cir. 2007) (citing *United States v. Koerth,* 312 F.3d 862, 866 [7th Cir. 2002]); *Peck,* 317 F.3d at 757. "The defendant must defeat this presumption with evidence that the issuing magistrate judge wholly abandoned his judicial role or that the officer's affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Wiley,* 475 F.3d at 917.

On November 27, 2006, Immigration and Customs Enforcement (ICE) Senior Special Agent Elizabeth Hanson obtained a search warrant for the Wauwatosa, Wisconsin residence of the defendant, Ted Pappas. In support of the search warrant, Special Agent Hanson submitted an affidavit, with the following paragraphs and information specific to the defendant:

> 16. In May 2005, San Diego ICE agents and members of the San Diego Internet Crimes Against Children Taskforce executed a search warrant at Michael Golubski's residence. Computer analysis of Golubski's computers revealed that Golubski had sent and received numerous e-mails with attachments

> of child pornography. Golubski used the e-mail name: "ExhibMale39" and "bob4funscal @yahoo.com." Between April 5, 2005, and May 1, 2005, Golubski (ExhibMales39) sent 17 e-mails with image or movie attachments to the e-mail name "longtalks@aol.com."
>
> 17. I have viewed all the e-mails sent by ExhibMale39 to Longtalks. It appears that eleven of the image and/or movie files depict minor girls engaged in sexually explicit conduct. Five of the images appear to be adult images/movie and one image depicts a girl of questionable age.

(Search Warrant Affidavit [Aff.] ¶¶ 16-17). The affidavit then described in detail three images that were sent to the defendant's e-mail address on April 5, 2005. These three e-mails contained images of nude or partially nude young girls engaged in sexually explicit conduct. The affidavit provided further information about the defendant.

> 18. AOL records indicate that the e-mail address "longtalks@aol.com" is registered to Ted Pappas. As of June 28, 2005, AOL's record shows that the "longtalks" e-mail address was deleted and Ted Pappas' email address became "TedP5785@aol.com.["] . . . As of November 11, 2006, Ted Pappas's account was active and his last log occurred November 7, 2006, at 23:23.

The affidavit also listed the defendant's address and daytime and evening telephone numbers as shown

on AOL billing information. Special Agent Hanson further averred:

> 19. Ted Pappas was arrested twice in 1980 by the Kenosha Police Department. Pappas was arrested on March 26, 1980, for disorderly conduct. This charge was later dismissed. Pappas was arrested again on August 27, 1980, for burglary. Pappas was convicted on November 21, 1980, on the burglary charge and received 12 years probation.
>
> 20. As of November 16, 2006, Wisconsin Department of Transportation (DOT) records reflect that Ted M. Pappas driver's license number is "P120-8126-1052-07," which was issued on January 30, 2004. The license will expire on February 12, 2012. Also according to Wisconsin DOT, Ted M. Pappas was born on [Date Of Birth Omitted]. . . .
>
> 21. WE Energies records reflect that Ted Pappas has received service [at his residence] since May 2000.
>
> 22. Wauwatosa Assessor's records, as of November 13, 2006, indicate that Ted Pappas is the owner of [this] residence. . . .
>
> 23. On November 16, 2006, a red mini van bearing the license plate number "643HZE" was parked in the driveway of [the defendant's residence].
>
> (Aff. ¶¶ 18-23).

The affidavit states that the license for the vehicle is registered to a company located in Milwaukee, Wisconsin. According to the affidavit, a Google search for the company is linked to a particular company's home page. This company's home page listed the defendant as its Wisconsin distributor.

The affiant also stated that, based on her training and experience, as well as the training and experience of other law enforcement personnel, she knows that individuals who collect depictions of minors engaged in sexually explicit conduct rarely, if ever, dispose of or alter these materials. Rather, the affiant stated that such individuals often keep child pornography images for long periods of time and treat them as prized possessions. She also averred that "[t]he dramatically-increased storage capacity of home computers in recent years facilitates the retention of image files for long periods of time; periods of greater than three years are not uncommon." (Aff. ¶ 24C). The affiant further averred that individuals involved in the collection and/or distribution of images of minors engaged in sexually explicit conduct almost always maintain and possess their materials in a place that they consider secure and where the materials are readily accessible. That place, according to the affiant, is most frequently the collector's home.

The warrant authorized agents to search the defendant's residence and seize computers and computer equipment, visual depictions of child pornography, and information pertaining to sexual activity with minors or the distribution, possession or receipt

of images of minors engaged in sexually explicit conduct or information pertaining to an interest in such images. The warrant specifically excluded a search of any kind of unopened electronic mail.

Recently, in *United States v. Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 (7th Cir. September 12, 2008), the court of appeals for this circuit addressed whether information relating to child pornography was stale. In *Prideaux-Wentz*, the affidavit in support of the search warrant included complaints submitted to the Cyber Tip Line of the National Center for Missing and Exploited Children (NCMEC) by Yahoo!, an internet service provider, regarding pictures containing child pornography and erotica that were uploaded to eight Yahoo! e-groups. The affidavit discussed the structure of Yahoo! e-groups and described each Cyber Tip submitted to NCMEC regarding the Yahoo! ID[2] "jackinpulpit2001" and the e-mail address "jackinpulpit2001@yahoo.com." The affidavit further stated that between August 15, 2003, and January 28, 2004, NCMEC received nineteen Cyber Tips that the "user with the 'jackinpulpit2001 ID uploaded sixty-nine images to different Yahoo! e-groups, pictures that [the agent] identified as both child pornography and child erotica." *Id.* at *4.

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[2] The Yahoo! ID is a unique identifier of a user's account, and an ID, along with a password, is required tin order to use Yahoo!'s services. *Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *4.

In addition, the agent provided information in the affidavit regarding "child pornography collector characteristics," which was based on his own experience, along with expert opinions from other FBI agents in the field. The agent averred that "[c]hild pornography collectors almost always maintain and possess their material in the privacy and security of their homes or some other secure location where it is readily available." *Id.* at *5. The agent also averred that "the collector [of child pornography] rarely, if ever, disposes of the collection." *Id.* As a result of this information, a search warrant was issued and executed on February 2, 2006.

The court recognized that "'[t]here is no bright-line test for determining when information is stale.'" *Id.* (quoting *United States v. Koelling*, 992 F.2d 817, 822 (8th Cir. 1993). The court acknowledged that it had suggested "that the staleness argument takes on a different meaning in the context of child pornography because of the fact that collectors and distributors rarely, if ever, dispose of their collections." *Id.* The court found that the warrant failed to indicate when the child pornography was uploaded to the Yahoo! e-groups and there was no way for the court to determine when it was uploaded. The court explained, however, that the record suggested that the images could have been uploaded as many as two years prior to the receipt of the Cyber Tips and, therefore, the information would have been at least four years old by the time the government applied for a warrant.

The court pointed out that, unlike the situation in *Newsom*, there was no new evidence of continuing criminal activity to "freshen" the stale evidence. *Cf. Newsom*, 402 F.3d at 783. Although declining to find evidence two to four years old stale as a matter of law, the court concluded that the evidence relied upon to obtain the warrant was stale and that the warrant lacked probable cause. "The four year gap, without more recent evidence, undermines the finding that there was probable cause that the images would be found during the search." *Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *11.

In this case, the affidavit in support of the search warrant stated that the defendant received by e-mail eleven images of child pornography between April 5, 2005 and May 1, 2005. The search warrant was issued November 27, 2006, 18 months after the images were sent. Although the defendant asserts that this information was stale and, therefore, does not establish probable cause to search his residence, evidence that is 18 months old is not stale as a matter of law and, in fact, evidence in child pornography cases older than 18 months has been found sufficient to establish probable cause. *Id.* at *10 (citing cases).

In this case, however, the only connections between the defendant and child pornography as alleged in the affidavit are the e-mails embedded with child pornography sent to the defendant by Mr. Golubski between April 5, 2005, and May 1, 2005. The affidavit is devoid of any evidence that the defendant communicated with Mr. Golubski in any

way prior to or after the receipt of the e-mails. There is no evidence that the defendant solicited the e-mails containing the child pornography. Moreover, the affidavit indicates that the defendant's e-mail address to which Mr. Golubski sent the e-mails was deleted in June of 2005, shortly after the e-mails were sent. It could reasonably be inferred that the defendant deleted this email account because he was receiving these e-mails sent by Mr. Golubski.

Regardless, the affidavit fails to provide any information that the defendant is a collector of child pornography. Rather, it includes only boilerplate statements about child pornography collectors generally. "In order to rely on profiles, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class." *Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *14 (quoting *United States v. Weber*, 923 F.2d 1338, 1345 [9th Cir. 1990]) (holding that the affidavit in that case did not establish probable cause that the defendant was a child molester when the "expert" portion of the affidavit was "foundation less" and clearly "was not drafted with the facts of this case or this particular defendant in mind."). As the court stated in *Prideaux-Wentz*, "'[rambling boilerplate recitations designed to meet all law enforcement needs' do not produce probable cause." 2008 U.S. App. LEXIS 19991 *4. (quoting *U.S. v. Zimmerman*, 277 F.3d 426, 433 n. 4 [3rd Cir. 2002] [quoting *Weber*, 923 F.2d at 1345]). Thus, although it is well-established that expert opinion may be presented in a search warrant

affidavit, it "must be tailored to the specific facts of the case to have any value." *Zimmerman*, 277 F.3d at 433 n. 4.

Here, there was nothing specific to the defendant to indicate that he was a collector of child pornography. Absent this foundation, the "collector profile" set forth in paragraph 24 of the affidavit did not apply to the defendant. *See Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *14. Moreover, the affidavit does not contain any more recent evidence of continuing criminal activity to bolster probable cause and freshen the older information. *See e.g., Newsom*, 402 F.3d at 783. Therefore, considering the totality of the information in the affidavit, the evidence relied upon to obtain the search warrant of the defendant's residence was stale. Accordingly, the court concludes that the warrant lacked probable cause.

The court must now determine whether the warrant can be upheld based on the "good faith" exception recognized in *Leon*, 468 U.S. at 926. In that case, the Supreme Court held that an officer's good faith reliance on a court's determination of probable cause should not lead to the exclusion of probative evidence simply because a reviewing court later determined that probable cause was lacking. Thus, a facially valid warrant issued by a neutral, detached magistrate will be upheld if the police relied on the warrant in good faith. *Id.* As noted, the decision to seek a warrant is *prima facie* evidence that the agent was acting in good faith. *Wiley*, 475 F.3d at 917,

United States v. Olson, 408 F.3d 366, 372 (7th Cir. 2005), *Koerth*, 312 F.3d at 866.

The defendant can "rebut this evidence, 'if the issuing judge wholly abandoned his judicial role and failed to perform his neutral and detached function, serving merely as a rubber stamp for the police or . . . the affidavit submitted in support of the warrant was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *11-12 (quoting *United States v. Olson*, 408 F.3d 366, 372 [7th Cir. 2005]) (internal quotations omitted).

The defendant asserts that Agent Hanson's reckless omission prevented the issuing judge from "knowing that Agent Hansen (sic) chose not to review the contents of the San Diego file so as to ascertain if the child pornography was solicited by Pappas or opened on his computer." (Defendant's Reply to Government's Response to Defendant's Motion to Suppress [Defendant's Reply] at 12). The defendant also asserts that a reasonable officer would have known that the warrant affidavit was lacking in probable cause because the affidavit establishes that the evidence was stale and that there was no foundation to rely on the collector profile assertions. In addition, the defendant points out that he deleted the screen name to which the e-mails were sent and that there was no evidence that the defendant ever solicited child pornography or that he received or opened the e-mails sent by Mr. Golubski.

The court has concluded that the affidavit in support of the search warrant involved only general boilerplate statements about individuals who collect child pornography. The agent's statements about child pornography collectors is not tailored to the specific facts in this case or with this defendant in mind. Moreover, it cannot reasonably be inferred from the information presented in the affidavit that the defendant was a collector. The affidavit is devoid of any information to show that the defendant himself is a child pornography collector or meets the collector's profile.

Without information specific to the defendant or some indices of ongoing conduct, the affidavit lacked any foundation to rely on the collector's profile. As the court points out in *Prideaux-Wentz*, 2008 U.S. App. LEXIS 19991 *4, "rambling boilerplate recitations designed to meet all law enforcement needs" are insufficient to establish probable cause. (citations omitted).

Here, the affiant, as an experienced agent, should reasonably have concluded that the defendant did not meet the collector's profile and, therefore, that the affidavit in support of the warrant did not establish probable cause for the search. The search warrant affidavit "was so lacking in probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 11-12. As a result, the search warrant cannot be upheld based on the "good faith" exception articulated in *Leon*.

In sum, the affidavit in support of the search warrant was stale and lacked probable cause. In addition, under the particular facts and circumstances of this case, the warrant cannot be saved by the "good faith" exception recognized in *Leon*. Therefore, the court will recommend that the United States district judge enter an order granting the defendant's motion to suppress.

CONCLUSION

NOW, THEREFORE, IT IS HEREBY RECOMMENDED that the United States district judge enter an order **granting** defendant Pappas' motion to suppress all evidence obtained during a search of his residence. (Docket #25).

Your attention is directed to 28 U.S.C. § 636(b)(1)(A) and General Local Rule 72.3 (E.D. Wis.), whereby written objections to any recommendation herein or part thereof may be filed within ten days of service of this order. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Courtesy paper copies of any objections shall be sent directly to the chambers of the district judge assigned to the case. Failure to file a timely objection with the district court shall result in a waiver of your right to appeal.

Dated at Milwaukee, Wisconsin, this 21st day of October, 2008.

BY THE COURT:

s/ Patricia J. Gorence
PATRICIA J. GORENCE
United States Magistrate Judge

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV

18 U.S.C.S. § 2252. Certain activities relating to material involving the sexual exploitation of minors

(a) Any person who –

(1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this *title [18 USCS § 1151]*, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, shipped, or transported using any means or facility of interstate or foreign commerce, or has been shipped or transported in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported using any means or facility of interstate or foreign commerce, including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; or

(4) either –

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this *title [18 USCS § 1151]*, knowingly

possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if –

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

(b)

(1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but if such person has a prior conviction under this chapter, section 1591 *[18 USCS § 1591]*, chapter 71, chapter 109A, or chapter 117 *[18 USCS §§ 2251* et seq.,

§§ 1460 et seq., *2241* et seq., or *2421* et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 10 years, or both, but if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117 *[18 USCS §§ 2251* et seq., *§§ 1460* et seq., *2241* et seq., or *2421* et seq.], or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) Affirmative defense. It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant –

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof—

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

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October 2, 2008

Magistrate Patricia Gorence
United States District Court
Eastern District of Wisconsin
517 E. Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: United States v. Ted Pappas, 08-CR-52

Dear Magistrate Gorence:

On October 1, 2008, this Court brought to the attention of defense counsel that the Application and Affidavit in support of the Search Warrant, attached as Exhibit 1 to Defendant's Memorandum of Law in support of his Motion to Suppress was not complete. Defense counsel apologizes for inadvertently submitting an incomplete copy of the Application and Affidavit in support of the Search Warrant and hereby submits a complete copy of Exhibit 1 for Defendant's Memorandum of Law in support of Motion to Suppress originally filed with this Court on July 29, 2008.

Very truly yours,

THE SHELLOW GROUP

s/ Robin Shellow

Robin Shellow
State Bar # 1006052

cc: Jonathan Koenig, AUSA

ATTORNEY
ROBIN SHELLOW

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

In the Matter of the Search of

620 N. 70th Street, Wauwatosa, Wisconsin, a one-story red brick Georgian style residence with white window and door trim, located on the east side of 70th Street, with a 3-step concrete porch at the front door, and a detached 2-car brick garage behind the house.

APPLICATION AND AFFIDAVIT SEARCH WARRANT

CASE NUMBER:
06-M-489

(Filed Oct. 2, 2008)

I, Elizabeth Hanson, being duly sworn depose and say: I am a Senior Special Agent for the Department of Homeland Security, Immigration & Customs Enforcement, and have reason to believe that on the property or premises known as 620 N. 70th Street, Wauwatosa, Wisconsin, in the Eastern District of Wisconsin there will be concealed certain property, namely the items listed on Attachment B, which are evidence of visual depictions transmitted in interstate commerce involving the use of minors engaged in sexually explicit conduct and constitute evidence of the commission of a crime, namely interstate receipt of child pornography, concerning violations of Title 18 United States Code, §§ 2252 and 2256. I am seeking authorization to search the above-described premises as well as any computers and computer equipment found therein.

The facts to support a finding of Probable Cause are as follows:

See the attached affidavit.

Continued on the attached sheet and made a part hereof.
✓ Yes No

/s/ Elizabeth Hanson
Signature of Affiant

Sworn to before me, and subscribed in my presence

November 27th, 2006 at 4:20 PM
Date and time issued

at Milwaukee, Wisconsin
City and State

William E. Callahan, Jr., U.S. Magistrate Judge
Name & Title of Judicial Officer

/s/ William E. Callahan
Signature of Judicial Officer

AFFIDAVIT

I, Elizabeth Hanson, being duly sworn, hereby depose and state:

1. I am a Senior Special Agent with the Department of Homeland Security, Immigration & Customs Enforcement (ICE), and have been employed by ICE (formerly U.S. Customs Service) since January 1989. I am currently assigned to the Resident Agent in Charge Milwaukee, Wisconsin office. As a Senior Special Agent, I am authorized to conduct investigations into matters involving the sexual exploitation

of minors, including alleged violations of 18 USC 2252(a), which makes it a federal offense for a person to knowingly transport or ship by any means in interstate or foreign commerce visual depictions of minors engaged in sexually explicit conduct. Section 2252 also makes it a federal crime to knowingly receive or distribute such depictions if the images have been mailed, shipped or transported in interstate or foreign commerce by any means including computer. Further, section 2252 makes it a federal crime to knowingly possess any book, magazine, film, videotape, or any other material that contains visual depictions of minors engaged in sexually explicit conduct that has been mailed, shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed or shipped or transported in interstate or foreign commerce by any means, including by computer.

2. I have had the opportunity to conduct and participate in numerous investigations related to the sexual exploitation of minors in the last 10 years. Further, in the course of these investigations, I have had broad exposure to visual depictions of minors engaged in sexually explicit conduct, and all forms of media. Since May 2003, I have conducted numerous forensic computer examinations on computers that ICE agents have seized, primarily in child pornographic investigations.

3. In the course of this investigation, I have obtained information contained in this affidavit in

person, from other law enforcement officers and from employees of companies mentioned in this affidavit. I consider this information reliable because it has been provided in a normal course of business and law enforcement activities. This affidavit is submitted for the limited purpose of establishing probable cause in support of a search warrant application and does not contain all the facts known by me in connection with this case. Consistent with my usual practice, I also reviewed my investigative file for any information that could be considered exculpatory. Had I found any, I would have included it in this affidavit. However, I found no such information.

4. This affidavit is submitted in support of an application for a search warrant for the premises located at 620 N. 70th Street, Wauwatosa, Wisconsin, as described more fully in **Attachment A**.

5. For the reasons set forth below, I believe that now located at the premises described above in paragraph 4, are the fruits, evidence, and instrumentalities of criminal offenses against the United States, specifically, as further described in **Attachment B**, evidence related to the possession and distribution of visual depictions of minors engaged in sexually explicit conduct in violation of 18 USC 2252.

Definitions

6. The primary statutory terms relevant to this investigation are found in Title 18, United States Code section 2256. Therein, a "minor" is defined as a

person under the age of 18 years old; a "visual depiction" includes film, videotape and electronically stored data, which is capable of being converted to visual image. "Sexually explicit conduct" is defined as actual or simulated sexual intercourse, bestiality, sadistic or masochistic abuse or lascivious display of a person's genitals or pubic area.

7. The term "computer" is defined pursuant to Title 18, USC, section 1030(e)(1), as: an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such a device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar devices.

8. For the purpose of this affidavit, unless otherwise specifically indicated, the term "computer" refers to the box that houses the central processing unit, along with any internal storage devices (such as internal hard drives) and internal communication device (such as internal modems capable of sending/receiving electronic mail or fax cards) along with any other hardware stored or housed internally. Thus, "computer" refers to hardware, software and data contained in the main unit. Printers, external modems, monitors, and other external attachments will be referred to collectively as peripherals and discussed individually when appropriate.

9. The term "computer hardware" as used in this affidavit refers to all equipment, which can collect, analyze, create, display, convert, store, conceal, or transmit electronic, magnetic, optical, or similar computer impulses or data. Hardware includes (but is not limited to) data processing devices (such as central processing units, memory typewriters, and self-contained laptop or notebook computers); internal and peripheral storage devices, transistor-like binary devices, and other memory storage devices; peripheral input/output devices (such as keyboards, printers, scanners, plotters, video display monitors, and optical readers); as well as any devices, mechanisms, or parts that can be used to restrict access to the computer hardware (such as physical keys and locks).

10. The term "computer software" as used in this affidavit refers to digital information, which can be interpreted by the computer and any of its related components to the way they work. Software is stored in electronic, magnetic, optical, or other digital form. It commonly includes programs to run operating systems, applications (such as word processing, graphics, or spreadsheet programs), utilities, compilers, interpreters, and communications program.

11. The term "computer related documentation" used in this affidavit refers to written, recorded, printed, or electronically stored material, which explains or illustrates how to configure or use computer hardware, software, or other related items.

12. Computer passwords and other data security devices are designed to restrict access to or hide computer software, documentation, or data. Data security devices may consist of hardware, software, or other programming code. A password (a string of alphanumeric or other special characters) usually operates as a "digital key" to "unlock" particular data security devices. Data security hardware may include encryption devices, chips, and circuit boards. Data security software or digital code may include programming code that creates "test" keys or "hot" keys, which perform certain pre-set security functions when touched. Data security software or code may also encrypt; compress; hide; or "booby-trap" protect data to make it inaccessible or unusable, as well as reverse the process to restore it.

13. Based upon my knowledge, training and experience, and experience of other law enforcement personnel, I know that the Internet is a worldwide computer network, which connects computers and allows communications and the transfer of data and information across the state and international boundaries. Individuals who utilize the Internet can communicate by using electronic mail (hereinafter referred to as e-mail), chat rooms, and or file servers to correspond and/or obtain graphic images.

14. Individuals who want to use the Internet must first obtain an account with a computer that is linked to the Internet; for example, through a University, an employer, or a commercial service, called an "Internet Service Provider" or "ISP". ISPs are commercial

organizations that provide individuals and businesses access to the Internet. ISPs may also provide a range of functions, accessing the Internet for their clients including, web hosting, and remote storage. Once the individual has accessed the Internet, that individual can use Internet mail services, visit web sites, send and receive e-mail via telephone based dial-up, digital subscriber lines (DSL), cable television, dedicated circuit and even satellite.

15. An Internet Protocol (IP) address is a unique number assigned to a computer. When a computer user is connected to the Internet, these addresses identify the Internet provider.

INVESTIGATION

16. In May 2005, San Diego ICE agents and members of the San Diego Internet Crimes Against Children Taskforce executed a search warrant at Michael Golubski's residence. Computer analysis of Golubski's computers revealed that Golubski had sent and received numerous e-mails with attachments of child pornography. Golubski used the e-mail name: "ExhibMale39" and "bob4funscal@yahoo.com." Between April 5, 2005 and May 1, 2005, Golubski (ExhibMales39) sent 17 e-mails with image or movie attachments to the e-mail name "longtalks@aol.com."

17. I have viewed all the e-mails sent by ExhibMale39 to Longtalks. It appears that eleven of the image and/or movie files depict minor girls engaged in sexually explicit conduct. Five of the images

appear to be adult images/movie and one image depicts a girl of questionable age. The following three images were all sent on April 5, 2005:

> On April 5, 2005 at 9:24 PM (EDT) ExhibMale39 sent Longtalks the image 2c5e.jpg. This image depicts a partially nude girl approximately 4 to 6 years old. The girl is pictured squatting over an erect adult male penis.
>
> On April 5, 2005 at 9:27 PM (EDT) ExhibMale39 sent Longtalks the image 4b1d.jpg. This image depicts a partially nude girl approximately 5 to 7 years old. The girl is sitting down with her leg spread open. The girl is holding an adult male penis close to her vagina.
>
> On April 5, 2005 at 9:31 PM (EDT) ExhibMale 39 sent Longtalks the image 897a.jpg. This image depicts a nude girl approximately 6 to 8 years old wearing white tights pulled up to her mid thighs. The girl is lying down on a bed with a dildo position in or near her rectum and a second dildo in her hands position in or near her vagina.

18. AOL records indicate that the e-mail address "longtalks@aol.com" is registered to Ted Pappas. As of June 28, 2005, AOL's record shows that the "longtalks" e-mail address was deleted and Ted Pappas's email address became "TedP5785@aol.com. AOL billing information showed Ted Pappas's address as: 620 N. 70th Street, Wauwautosa, Wisconsin, 53213. AOL listed Ted Pappas's telephone number as:

[Phone Number Omitted] (daytime) and [Phone Number Omitted] (evening). As of November 11, 2006, Ted Pappas's account was active and his last log occurred November 7, 2006, at 23:23.

19. Ted Pappas was arrested twice in 1980 by the Kenosha Police Department. Pappas was arrested on March 26, 1980, for disorderly conduct. This charge was later dismissed. Pappas was arrested again on August 27, 1980, for burglary. Pappas was convicted on November 21, 1980, on the burglary charge and received 12 years probation.

20. As of November 16, 2006, Wisconsin Department of Transportation (DOT) records reflect that Ted M. Pappas driver's license number is "[Drivers License Omitted]," which was issued on January 30, 2004. The license will expire on February 12, 2012. Also according to Wisconsin DOT, Ted M. Pappas was born on [Date Of Birth Omitted] and resides at 620 N. 70th Street, Wauwatosa, Wisconsin.

21. WE Energies records reflect that Ted Pappas has received service at 620 N. 70th Street, Wauwatosa, Wisconsin since May 2000.

22. Wauwatosa Assessor's records, as of November 13, 2006, indicate that Ted Pappas is the owner of the residence at 620 N. 70th Street, Wauwatosa, Wisconsin 53213-3854.

23. On November 16, 2006, a red mini van bearing the license plate number "643HZE" was parked in the driveway of 620 N. 70th Street, Wauwatosa, WI. This

license plate number is registered to Gordon N. Stowe and Associates, 4836 W. Forest Home Avenue, Milwaukee, Wisconsin. A Google search for Gordon N. Stowe and Associates is linked to TreMetrics Homepage. The TreMetrics homepage listed Ted Pappas as the Wisconsin TreMetrics distributor. TreMetrics designs and manufactures hearing and health testing equipment.

24. Based on my training, experience, as well as the training and experience of other law enforcement personnel, I know that:

A. Depiction of minors engaged in sexually explicit conduct is produced almost exclusively for a pedophile audience and such production involves the sexual exploitation of minors. Pedophiles utilize minors as sexual objects, receive sexual gratification and satisfaction from actual contact with minors and/or from fantasies involving the use of visual depictions of minors. These depictions range from nude or fully clothed depictions of minors engaged in non-sexual activity to depiction of minors engaged in sexual activity.

B. The use of a computer to traffic in, trade, and/or collect depictions of minors engaged in sexually explicit conduct has become one of the preferred methods of obtaining/sending images of minors engaged in sexually explicit conduct. A computer user can use his computer in the privacy of his/her own home or office, and interact with other individuals offering such materials in this country or elsewhere

in the world. The use of a computer provides individuals interested in images of minors engaged in sexually explicit conduct with a sense of privacy and secrecy.

C. Individuals who collect depictions of minors engaged in sexually explicit conduct rarely, if ever, dispose of or alter such materials. Rather, these materials are treated as prized possessions. The dramatically-increased storage capacity of home computers in recent years facilitates the retention of image files for long periods of time; periods of greater than three years are not uncommon. Computer files can be protected through the use of security programs, passwords and devices.

D. Individuals involved in the collection and/or distribution images of minors engaged in sexually explicit conduct almost always maintain and possess their materials in a place that they consider secure and where the materials are readily accessible. This is most frequently within the privacy and security of their homes.

E. Individuals who collect, procure and/or distribute depictions of minors in sexually explicit conduct will commonly collect and maintain telephone numbers, computer addresses, or lists of other persons who have similar sexual interests. This information is saved as a means of personal referral, exchange and/or profit. Individuals who collect, procure and/or distribute images of minors engaged in sexually explicit conduct will commonly collect video

tapes, magazines, publications and/or pamphlets depicting minors engaged in sexually explicit conduct and/or information pertaining to the interest in minors engaged in sexually explicit conduct.

F. Individuals who collect, procure and/or distribute images of minors engaged in sexually explicit conduct via the computer will commonly collect and maintain the names of web-sites and E-mail addresses of other persons who have similar sexual interests. The information is saved as means of personal referral, exchange and/or profit for minors. Further, a forensic computer analyst can review a person's log files for information concerning when a person created, last accessed or moved image files. Moreover, a computer can contain text documents, deleted e-mail and lists of persons with whom the user frequently communicates, all of which can yield important evidence to the crimes of distributing and possessing images of minors engaged in sexually explicit conduct.

25. Based upon my training and experience, as supplemented through contact with other law enforcement officers knowledgeable in the field of computer forensics, I know:

A. Conducting a search of a personal computer system, documenting the search, and making evidentiary and discovery copies is a lengthy process. It is necessary to determine that no security devices are in place that could cause the destruction of evidence during the search of the computer. In many cases it is

impossible to conduct a search of magnetically stored data absent special utility programs and hardware.

B. Computer evidence is extremely vulnerable to tampering or to destruction through error, electrical outages, and other causes, and removal of the system from the premises will assist in retrieving the records authorized to be seized, while avoiding accidental destruction or deliberate alteration of the records. It is extremely difficult to secure a computer system on the premises during the entire period needed for a safe and an effective search.

C. Data that have been stored in files, on floppy diskettes, or on hard drives, and which have been purportedly erased or deleted, are often still retrievable although their existence may not be ascertained without safe and proper analysis.

D. There will often be evidence on a computer's hard drive of data of files, which have only temporarily existed in that computer's random access memory (RAM) and which were never intentionally saved to said hard drive.

E. It is necessary to have access to all accompanying software and related manuals in order to properly access and work with computer files, which have been created with said proprietary application programs. Passwords for encrypted or otherwise protected files are often written in instruction manuals.

F. Without examination it is impossible to determine if a diskette which appears to be commercially available software actually contains that program or contains disguised or hidden data or image files representing evidence.

ATTACHMENT A – PLACE TO BE SEARCHED

The premises at 620 N 70th Street, Wauwatosa, Wisconsin, being a two-story red brick Georgian style dwelling with white window and door trim, located on the east side of 70th street, as well as any computers or computer equipment found therein.

The premises are further described as follows: A three-step concrete porch leads up to the front door, which is dark in color, possibly green or black. Attached to the window sill, near the front door, is a black mail box. The house number is not displayed on the house, door, or mailbox. A detached two-car brick garage is located behind the house.

ATTACHMENT B

Items to be Seized

1. Computers and computer equipment (to include tapes, cassettes, cartridges, commercial software and hardware, computer disks, disk drives, monitors, computer printers, modems, tapes drives, disk application systems, magnetic media, floppy disks, external data storage devices, digital cameras, scanners),

visual depictions of child pornography, and information pertaining to sexual activity with minors or the distribution, possession or receipt of images of minors engaged in sexually explicit conduct or information pertaining to an interest in such images.

2. Records evidencing occupancy or ownership of the premises searched, including, but not limited to, utility and telephone bills, mail envelopes, or addressed correspondence.

3. Records and other items which evidence ownership or use of computer equipment found in the above residence, including but not limited to, sales receipts, bills for Internet access, handwritten notes and handwritten notes in computer manuals.

ATTACHMENT C

Addendum to Search Warrant (Computer Search Protocol)

If such computer equipment as described cannot be analyzed at the search site, the warrant allows for seizure of such equipment and removal from the premises for analysis. In that event, the government will furnish to the issuing Magistrate Judge, every 14 days after the warrant is returned, a status update regarding the analysis being conducted. These updates will continue to be submitted until the analysis is complete or until further order of the court. If it is determined that the computer is contraband because it was used in furtherance of criminal activity or

constitutes fruits of said criminal activity, then the government will report this to the issuing Magistrate Judge, and will request that such reporting obligations cease and that it be allowed to maintain custody of the computer. If computer is determined not to be contraband or fruits of said criminal activity and is determined not to be otherwise subject to seizure by the government, then the government agrees to return the computer equipment upon completion of the analysis.

In conducting the search authorized by this warrant, whether performed on site or in a laboratory, or other controlled environment, the government shall make reasonable efforts to utilize computer search methodology to search for only files, documents or other electronically stored information which are identified in the warrant itself and any attachments thereto.

The search methodology may include, but is not limited to, the following techniques:

(a) surveying various file "directories" and the individual files they contain (analogous to looking at the outside of a file cabinet for the markings it contains and opening a drawer believed to contain pertinent files);

(b) "opening" or cursorily reading the first few "pages" of such files in order to determine their precise contents;

(c) "scanning" storage areas to discover and possibly recover recently deleted data;

(d) scanning storage areas for deliberately hidden files; or

(e) performing key word searches through all electronic storage areas to determine whether occurrences of language contained in such storage areas exist that are intimately related to the subject matter of the investigation.

This warrant and this search procedure specifically excludes a search of any kind of unopened electronic mail. No search of unopened electronic mail shall be conducted without a separate search warrant supported by probable cause. Appropriate efforts shall be made to minimize the disclosure of records and other information which are not the subject of this warrant.

Date/Time	To	Messenge #	Image Name	CP	Adult	?
4/5/05 9:24 PM	Longtalks	7	2c5e.jpg	X		
4/5/05 9:27 PM	Longtalks	8	4b1d.jpg	X		
4/5/05 9:31 PM	Longtalks	9	897a.jpg	X		
4/12/05 8:57 PM	Longtalks	23	PTHC -Hot14yr Stripper.mpg	X		
4/20/05 2:26 PM	Longtalks	73	1695.jpg	X		
4/20/05 2:27 PM	Longtalks	74	8564.jpg	X		
4/22/05 8:31 PM	Longtalks	98	1281.jpg	X		
4/22/05 9:12 PM	Longtalks	99	ad20.jpg	X		
4/22/05 9:53 PM	Longtalks	102	Kiddy-babyj.mpeg	X		
4/22/05 9:54 PM	Longtalks	103	babyjpurple1meg.mpeg	X		
5/1/05 12:56 AM	Longtalks	175	ped - 10yo willing daugheter pthc.wmv	X		
4/22/05 9:52 PM	Longtalks	101	Child_01_lol.mpg			X
4/5/05 9:07 PM	Longtalks	6	119f.jpg		X	
4/22/05 9:32 PM	Longtalks	100	873b.jpg		X	
4/22/05 9:55 PM	Longtalks	104	feeding cum.wmv		X	
4/26/05 10:54 PM	Longtalks	143	1811/jpg		X	
4/26/05 11:05 PM	Longtalks	144	9d8b.jpg		X	

(2)

No. 09-1285

In the Supreme Court of the United States

TED L. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence obtained during a warrant search of petitioner's residence is admissible under the good-faith exception to the exclusionary rule.

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In the Supreme Court of the United States

No. 09-1285

TED L. PAPPAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 592 F.3d 799. The report and recommendation of the magistrate judge (Pet. App. 35-56) and the district court's order adopting that report and recommendation (Pet. App. 21-34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2010. The petition for a writ of certiorari was filed on April 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the Eastern District of Wisconsin indicted petitioner on two counts of possessing visual depictions of minors engaging in sexually explicit

conduct, in violation of 18 U.S.C. 2252(a)(4)(B). The district court granted petitioner's pre-trial motion to suppress evidence seized during a warrant-authorized search of his home and statements he made during the search. Pet. App. 21-34. On the government's interlocutory appeal, the court of appeals reversed and remanded. *Id.* at 1-11.

1. In May 2005, law enforcement agents in San Diego, California, executed a warrant to search Michael Golubski's account with America Online (AOL), an Internet service provider. Pet. App. 2. The search revealed that, between April 5 and May 1, 2005, Golubski sent 17 messages, including 11 that contained child pornography, to "longtalks@aol.com." *Id.* at 2, 72. Records later obtained from AOL showed that petitioner used longtalks@aol.com as his email address until June 28, 2005; that petitioner then changed his email address to TedP5785@aol.com and continued to use that account through at least November 2006; and that petitioner resided in Wauwatosa, Wisconsin. *Id.* at 2, 73-74.

In November 2006, Immigration and Customs Enforcement Special Agent Elizabeth Hanson informed an Assistant United States Attorney in the Eastern District of Wisconsin of the results of the California investigation and inquired about the possibility of securing a warrant to search petitioner's residence. Pet. App. 2. As part of that consultation, Agent Hanson and the prosecutor reviewed the facts together, and Agent Hanson prepared a detailed affidavit in support of a warrant application. *Id.* at 2; Gov't C.A. Br. 7; see Pet. App. 65-83 (search warrant affidavit). The affidavit set forth Agent Hanson's professional experience investigating the sexual exploitation of minors, detailed three of the 11 sexually explicit images of children sent to petitioner,

stated that petitioner continued to maintain an AOL email account (TedP5785@aol.com), and provided information corroborating petitioner's address and identity. Pet. App. 2-3, 66-68, 72-74. The affidavit also noted that individuals who collect child pornography frequently use computers to obtain and retain those images, typically retain the pornographic images for years, and often keep such images in their homes. *Id.* at 2, 75-77.

On the basis of the affidavit, a magistrate judge issued a warrant to search petitioner's residence for evidence of child pornography possession. Pet. App. 24. Law enforcement agents executed the warrant the next day. *Ibid.* Petitioner spoke to the agents during the search, admitting that he had used the screen name longtalks@aol.com to trade adult pornography in chat rooms and over email. *Id.* at 3. Petitioner also stated that he had received images and videos of child pornography, but that he deleted them. *Ibid.* The agents, however, found images of child pornography on the hard drive of petitioner's computer and on a floppy disk seized during the search. *Ibid.*

2. A grand jury in the Eastern District of Wisconsin charged petitioner on two counts of possessing visual depictions of minors engaging in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(4)(B). Indictment 1-3. Petitioner moved to suppress all of the evidence obtained as a result of the search, contending that the warrant authorizing the search was not supported by probable cause. Pet. App. 36-37.

A magistrate judge recommended that the suppression motion be granted. Pet. App. 35-56. In the magistrate judge's view, the affidavit in support of the warrant did not establish probable cause because it relied on stale information (email messages found on Golubski's

AOL account 18 months earlier) and provided an insufficient basis for inferring that petitioner was a collector of child pornography. *Id.* at 50-52. The magistrate judge declined to apply the good-faith exception to the exclusionary rule recognized in *United States* v. *Leon*, 468 U.S. 897 (1984), because in her view, "[t]he search warrant affidavit was so lacking in probable cause" that it was "entirely unreasonable" for the agents to rely on it. Pet. App. 54 (internal quotation marks omitted).

The district court adopted the magistrate judge's recommendation and granted petitioner's suppression motion. Pet. App. 21-34. Because "the government [had] concede[d] that probable cause for issuance of the warrant may have been lacking," the district court addressed only whether the good-faith exception to the exclusionary rule applied. *Id.* at 25. The court declined to apply that exception, explaining that the affidavit failed to provide information "connecting boilerplate averments about collectors of child pornography to [petitioner]." *Id.* at 27. In the district court's view, "a reasonable agent would know that the (scant) information presented in support of [the] search warrant was wholly insufficient and stale." *Id.* at 32. The court subsequently denied the government's reconsideration motion and stayed proceedings pending resolution of the government's interlocutory appeal. *Id.* at 12-13, 17.

3. The court of appeals reversed and remanded. Pet. App. 1-11. The court explained that, under this Court's decision in *Leon*, "evidence obtained in violation of the Fourth Amendment is nonetheless admissible if the officer who conducted the search acted in good faith reliance on a search warrant." *Id.* at 4. The fact that the officer obtained the warrant, the court added, "is prima facie evidence of good faith." *Ibid.* (internal quo-

tation marks omitted). The court observed that "a defendant may rebut the prima facie evidence of good faith" by establishing that "the affidavit * * * was so lacking in probable cause as to render official belief in its existence entirely unreasonable," *ibid.* (internal quotation marks omitted), but concluded that petitioner had not made such a showing here, *id.* at 5-10.

As the court explained, the affidavit recounted "that at least eleven images of child pornography had been sent to [petitioner's] email account" and that petitioner had an active AOL email account and "continued access to a computer on which child pornography could be stored." Pet. App. 5. Petitioner had argued that there was no evidence that he solicited the child pornography that was sent to him; the court replied that "an officer could reasonably believe that the number of email messages containing child pornography sent to [petitioner], and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, was sufficient to establish probable cause." *Id.* at 6. The court also rejected petitioner's contention that his change of email account suggests he did not want to continue receiving child pornography, stating that it is "much more likely" that "[petitioner] changed his email account to avoid detection," noting that petitioner "waited nearly three months after he received the first email from Golubski to change his email address" and "received numerous images of child pornography" in the meantime. *Id.* at 6-7. The court also held that the 18-month delay between the transmission of the email messages and the issuance of the search warrant did not render reliance on the search warrant unreasonable, explaining that there is no "bright line for when information is stale," *id.* at 7, and the delay here "was not so

great as to overcome the presumption of good faith," *id.* at 11. And the court stated that Agent Hanson's "consult[ation] with an Assistant United States Attorney" before seeking a warrant provided "additional evidence" of good faith. *Id.* at 5 (internal quotation marks omitted).

Finally, the court held that it was not unreasonable to believe that petitioner was a collector of child pornography and that the agent's observations about child pornography collectors applied to him. Pet. App. 8-9. The court explained that "there is no magic 'profile' of child pornography 'collectors' that must be attested to in a search warrant affidavit"; rather, "the moniker 'collector' merely recognizes that * * * because child pornography is difficult to come by, those receiving the material often keep the images for years." *Ibid.* Here, the court explained, the evidence that petitioner possessed numerous images of child pornography justified "inclusion of the child-pornography boilerplate [language]" in the search warrant affidavit. *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 13-25) that the good-faith exception to the exclusionary rule should not apply on the facts of this case. Review of that claim should be denied because the court of appeals' decision is interlocutory. Moreover, the court of appeals' fact-bound decision is correct and does not conflict with the decisions of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As an initial matter, review should be denied because this case is an interlocutory posture. The court of appeals reversed the district court's order suppressing evidence and remanded the case for further proceed-

ings. The lack of any final judgment below is "a fact that of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring in denial of certiorari). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258. This Court therefore routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 & n.63 (9th ed. 2007).

That practice promotes judicial efficiency. The case will now return to the district court, which has stayed proceedings pending resolution of the government's appeal. Pet. App. 17. If petitioner is acquitted, his claim will become moot. If petitioner is convicted, he can present all of his claims that the court of appeals rejects to this Court, following a final judgment, in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" most recent judgment).

2. Review is also unwarranted because the court of appeals' fact-bound decision applying the good-faith exception to the exclusionary rule in this case is correct

and does not conflict with the decisions of this Court or another court of appeals.

a. In *United States* v. *Leon*, 468 U.S. 897 (1984), the Court held that evidence seized pursuant to a defective search warrant may be admitted if the executing officers relied on the warrant in objective good faith. "In the ordinary case," the Court observed, executing officers "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id.* at 921. Officers can only be expected to do so in extraordinary circumstances where, for example, the "warrant [is] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923 (internal quotation marks omitted).

The court of appeals correctly stated the established rule in *Leon*, Pet. App. 4-5, and correctly applied it to the specific facts of this case. The court observed that the warrant established petitioner's receipt of at least 11 images of child pornography over several weeks, and it concluded that "an officer could reasonably believe that the number of email messages containing child pornography sent to [petitioner], and the risk inherent in sending even one image of child pornography to anyone other than a willful recipient, was sufficient to establish probable cause." *Id.* at 5-6. The court explained that the affidavit established that petitioner had an active AOL email account and "continued access to a computer on which child pornography could be stored," *id.* at 5, and that collectors of child pornography typically retain such material for many years, *id.* at 8-9. Finally, the court noted that law enforcement officer's consultation with an Assistant United States Attorney provided additional evidence of good faith. *Id.* at 5.

Petitioner contends (Pet. 13) that the agents could not reasonably rely on the warrant because the supporting affidavit identified "no fact, act or behavior [tying petitioner] to the alleged illegal conduct." But as the court of appeals explained, this argument overlooks the most critical facts set forth in the affidavit: that petitioner was sent at least 11 images of child pornography via separate messages sent on five different dates to an email address that he maintained for weeks after the last message had been sent. Pet. App. 5; see *id.* at 83 (listing email messages). These facts strongly support the inference that petitioner was a willing recipient of the materials. *Id.* at 6. Under all of those circumstances, the court of appeals did not err in rejecting petitioner's contention that the detailed search warrant affidavit was so lacking in probable cause that it was unreasonable for agents to rely upon it.

b. Petitioner is mistaken in contending (Pet. 14-17) that the decision below conflicts with the decisions of other courts of appeals. Most of the decisions he cites address what facts are sufficient to establish probable cause that child pornography will be found on a particular computer. But the court of appeals did not address whether the warrant affidavit here established probable cause; rather, the court assumed that probable cause was lacking and asked whether the evidence obtained was nonetheless admissible under the good-faith exception set out in *Leon*. Pet. App. 4 & n.1 (court addressed only "whether a reasonable officer could believe probable cause supported the issuance of the warrant"); see *Leon*, 468 U.S. at 925 (recognizing that courts have "discretion" to pretermit "Fourth Amendment questions by turning immediately to a consideration of the officers' good faith"). Because the government did not

press—and the court of appeals did not pass on—the underlying issue of probable cause, this case presents no occasion for the Court to consider that issue. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Only three of the decisions petitioner cites address the good-faith exception, and the different outcomes in those cases are attributable to differences in the evidence, rather than any disagreement about the applicable legal rules. In *United States* v. *Rice*, 358 F.3d 1268, 1275-1276 (10th Cir. 2004), vacated on other grounds, 543 U.S. 1103 (2005)—a case similar to this one—the court of appeals held that the good-faith exception applied where the affidavit described the defendant's receipt of several sexually explicit email messages that linked the defendant to child-pornography websites. See also *United States* v. *Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008) (applying good-faith exception where affidavit detailed that defendant uploaded numerous images of child pornography to an electronic bulletin board). By contrast, in *United States* v. *Weber*, 923 F.2d 1338, 1344-1346 (9th Cir. 1990), the court of appeals declined to apply the *Leon* exception where the warrant affidavit was based primarily on the fact that one package containing advertising for material that "apparently" was child pornography was sent to the defendant, and the defendant never received any images of child pornography. *Id.* at 1340. That situation is very unlike the situation here, where petitioner was sent numerous emails containing child pornography over a period of several weeks. And the Ninth Circuit in *Weber* stated the same legal rule used by the court of appeals here, the *Leon* good-faith exception. *Id.* at 1346. The fact that the two courts came to different conclusions on dif-

ferent facts does not evidence a conflict warranting this Court's review.

Petitioner likewise fails to identify any disagreement in the circuits regarding the legal standards for establishing probable cause to search a computer for child pornography. One of the cases petitioner cites holds that there was probable cause in facts like those here. See *United States* v. *Kelley*, 482 F.3d 1047, 1053 (9th Cir. 2007) (finding probable cause where affidavit described defendant's receipt of nine email messages containing child pornography "on multiple occasions"; "concrete evidence" that a defendant "actually solicited" illicit images was not required, so long as "it appears likely that he did from the facts averred in the affidavit and reasonable inferences drawn from them"), cert. denied, 552 U.S. 1104 (2008). In two other cases petitioner cites, the courts also found probable cause to support searches of defendants' computers, based largely on evidence that the defendants subscribed to pornographic web sites. See *United States* v. *Wagers*, 452 F.3d 534, 540 (6th Cir.), cert. denied, 549 U.S. 1032 (2006); *United States* v. *Gourde*, 440 F.3d 1065, 1070-1072 (9th Cir.) (en banc), cert. denied, 549 U.S. 1032 (2006). The remaining cases petitioner cites—*United States* v. *Stulock*, 308 F.3d 922, 925 (8th Cir. 2002), and *United States* v. *Romm*, 455 F.3d 990, 998 (9th Cir. 2006), cert. denied, 549 U.S. 1150 (2007)—do not address the question of probable cause but instead concern the distinct issue of what evidence suffices to prove knowing possession of child pornography beyond a reasonable doubt. Again, to the extent that courts have reached different outcomes on that question, they are attributable to differences in the evidence, rather than a disagreement about the applicable legal standards.

3. Petitioner contends (Pet. 18-22) that the court of appeals erred in considering, as evidence of good faith, the fact that the law enforcement agent consulted with an Assistant United States Attorney. He is mistaken. As an initial matter, the court of appeals did not hold, as petitioner suggests (Pet. 18), that "the subjective judgment of a prosecutor" may "replace[] the objective and neutral" judgment of a detached judicial officer. Rather, the court held that the search warrant affidavit was not so lacking in probable cause as to make reliance upon it unreasonable, and then stated that consulting with the prosecutor before applying for a search warrant provided "additional evidence" of good faith. Pet. App. 5 (internal quotation marks omitted).

The court's latter observation is entirely consistent with *Leon* and a companion case, *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984). In *Sheppard*, this Court applied the good-faith exception based in part on the fact that "[t]he officers * * * took every step that could reasonably be expected of them," including having the search warrant affidavit prepared by the investigating detective "reviewed and approved by the District Attorney." *Id.* at 989. And in *Leon*, the Court likewise noted that the officer's "extensive application" for a search warrant "was reviewed by several Deputy District Attorneys," which was one of many factors that made "the officers' reliance on the magistrate's determination of probable cause * * * objectively reasonable." 468 U.S. at 902, 926.

As petitioner acknowledges (Pet. 21), the courts of appeals have routinely treated an officer's consultation with the prosecutor as "additional evidence of * * * objective good faith." Pet. App. 5 (quoting *United States* v. *Bynum*, 293 F.3d 192, 198 (4th Cir. 2002), and

collecting cases); see also, *e.g.*, *United States* v. *Hallam*, 407 F.3d 942, 947 (8th Cir. 2005); *United States* v. *Johnson*, 78 F.3d 1258, 1264 (8th Cir.), cert. denied, 519 U.S. 889 (1996); *United States* v. *Mendonsa*, 989 F.2d 366, 369-370 (9th Cir. 1993); *United States* v. *Brown*, 951 F.2d 999, 1005 (9th Cir. 1991); *United States* v. *Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990), cert. denied, 499 U.S. 919 (1991). Petitioner identifies no disagreement in the circuits on this point. Indeed, he acknowledges that "[p]rosecutorial approval may increase an agent's subjective good faith that probable cause exists." Pet. 19 (emphasis omitted). Accordingly, the court of appeals did not err in identifying consultation with a prosecutor as additional evidence of good faith.

4. Finally, there is no merit to petitioner's contention (Pet. 22) that the court of appeals' decision creates a conflict on the question whether the inclusion of a so-called collector's profile in a warrant affidavit can contribute to a finding of probable cause. The court of appeals did not hold that an affidavit with a boilerplate profile and no connection to the defendant may establish probable cause. To the contrary: the court stated that an affidavit "must lay a foundation" to "connect[]" the defendant to child pornography, such as by showing that he "uploaded or possessed multiple pieces of child pornography." Pet. App. 8-9 (internal quotation marks omitted). That is the same point made in *Weber*, 923 F.2d at 1345, and *United States* v. *Zimmerman*, 277 F.3d 426, 433 n.4 (3d Cir. 2002), the decisions petitioner cites.* Indeed, the court of appeals itself relied upon

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* Petitioner also cites (Pet. 24) *United States* v. *Gourde*, 382 F.3d 1003, 1013 (9th Cir. 2004), but that decision was reheard en banc, and the en banc court found that the facts asserted in the affidavit established probable cause, see 440 F.3d at 1069-1074.

Weber and *Zimmerman* in *Prideaux-Wentz*, when it stated that there must be "a bridge connecting * * * general averments" such as collector profiles to the target of the search at issue. 543 F.3d at 961. Applying that principle here, the court concluded that petitioner's receipt of 11 images of child pornography over a period of several weeks provided a sufficient bridge, at least so that it was not unreasonable for agents to rely upon the warrant. Pet. App. 8-9. That fact-specific conclusion does not conflict with the decisions in *Weber* and *Zimmerman* and does not otherwise warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-1285

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In The
Supreme Court of the United States

TED L. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO SOLICITOR GENERAL'S BRIEF IN OPPOSITION

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INTRODUCTION

The district court, in granting the Motion to Suppress, foreshadowed the dire consequences of a reversal of its ruling. The Honorable Charles N. Clevert, Jr. wrote:

> . . . little in the affidavit distinguishes Pappas from any other citizen who received unsolicited email. The only fact connecting Pappas to child pornography in the warrant affidavit was that a third party emailed illegal images eighteen months earlier to an account once registered to Pappas but since deleted. Other information presented in the warrant – that Pappas maintains a different email account through AOL . . . ; that Pappas was arrested over twenty years ago for burglary; that Pappas is employed, possesses a drivers license, and lives in Wauwatosa – is insignificant in the absence of any affirmative steps taken by Pappas to access child pornography.

Pet. App. 31-32.

In light of the appellate court's reversing decision, every one of AOL's 46.6 million email account holders *and* every one of Gmail's 91.9 million email account holders *and* every one of Hotmail's 43.5 million email account holders, plus millions of other email account holders are subject to search if

someone emails them illegal matter. *See* http://techcrunch.com/2009/01/14/gmail-grew-43-percent-last-year-aol-mail-and-hotmail-need-to-start-worrying/ (last accessed July 23, 2010).

The Solicitor General labors to obscure the shocking fact that, based on the appellate court's decision, any email user's computer is subject to search for receipt of child pornography, if targeted with illegal emails. Innocent email users will unavoidably be targeted with illegal emails, despite the "inherent risks" noted by the appellate court. Pet. App. 6. Pushers of child pornography do not differ drastically from people who offer and front illegal drugs to strangers, some of whom could be informants. When hope of potential gains outweighs the perceived risks, illegal images will be sent to potential new consumers, e.g. those who consume adult pornography, in the hopes of getting them hooked.

The appellate court concluded that being an addressee of only one image of child pornography allows an officer to reasonably believe that the addressee is a willing recipient of child pornography, because of the "risk inherent in sending" illegal images. *Id.* If being an addressee of one illegal image, with no other relevant affirmative act, supports probable cause in the Seventh Circuit, then that circuit's law conflicts with the law in other circuits, as argued in the Petition, at pages 13-17.

Child pornography was emailed to Petitioner in so-called "embedded attachments," which would

automatically appear on the recipient's screen upon opening the message, without the recipient having to perform a second function to display the attachment. In a similar way, innocent users such as the prosecutors and defense counsel in this case, or court staff, can be targeted with illegal emails and unwittingly receive child pornography. Even if immediately deleted, such child pornography is retained in the free space of computer hard drives for years or even decades. Computer owners will then be subject to search and prosecution for receipt and/or possession of child pornography, although the Government has no proof that they did any act other than delete that which was unsolicited, and which they received unknowingly and unwillingly.

The Government in this case conceded probable cause when it invoked the *Leon* exception. After conceding probable cause the Government argued that the search ought to be salvaged, because *the same* government which conceded probable cause had reviewed the affidavit prior to its submission to the magistrate.

The good faith exception will not be manipulated to cloak the fact that the government acts as "the fox guarding the hen house" in first approving affidavits and later invoking its own approval to salvage searches concededly lacking in probable cause. Neither the Fourth Amendment nor the *Leon* exception will be twisted to sanction such an insidious maneuver. Were this Court to sanction it, federal agents would routinely have local prosecutors peruse

their affidavits, because that activity would automatically defeat a challenge to probable cause.

The Solicitor General labors to camouflage the stark reality that the affidavit underlying the warrant in this case contained "*nothing* indicating that evidence of receipt or possession of child pornography would likely exist at Pappas' residence." Pet. App. 28 (emphasis added). The word "nothing" denotes the utter lack of any indicia of probable cause. The district court stated: the "good faith exception could not have been designed to save searches stemming from a warrant affidavit so objectively lacking in probable cause." *Id.* at 32.

The Fourth Amendment protects America's email users from the unreasonable searches sanctioned by the appellate court in this case. The good faith exception cannot save searches stemming from affidavits "so objectively lacking in probable cause." *Id.* If this Court felt that the good faith exception applied to affidavits objectively lacking in probable cause, it would not have recognized exceptions to the *Leon* exception, one of which was invoked by Petitioner. *See United States v. Leon*, 468 U.S. 897, 919 at n.20, 923 (1984); *see also* Pet. App. 5.

I. THE APPELLATE COURT'S RULING SHOULD BE REVIEWED NOW, DESPITE ITS INTERLOCUTORY NATURE

A. This case is extraordinary and extraordinarily urgent.

This Court must review this extraordinary case regardless of its interlocutory posture. The fate of thousands of law-abiding email users hangs in the balance. Thousands of innocent people who receive and delete unwanted emails could have their homes searched just because they once had an email address and access to a computer.

This is one of a handful of "extraordinary cases" with "unusual factors" and of "peculiar gravity and general importance," meriting this Court's resolution before the proceedings below become final. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also* Robert L. Stern & Eugene Gressman, *et al.*, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some . . . *unusual factor*, the interlocutory nature of a lower court judgment will *generally* result in a denial of certiorari." (emphasis added)).

This case is extraordinary, first, because it affects the vast population of citizens who have email accounts; and second, because it affects these citizens' fundamental constitutional right to be secure in their persons and effects, and free from unreasonable searches. *See e.g. Herring v. United States*, 129 S. Ct. 695, 707 (2009). In its practice, this Court has found

cases "extraordinary" and worthy of certiorari despite their interlocutory status, when they implicated fundamental constitutional rights.

Review by this Court is urgently needed also because the challenged decision of the appellate court affects the conduct of hundreds of officers in seeking, obtaining, and executing search warrants on a daily basis, all over this country. The Internet Crimes Against Children (ICAC) Task Force Program has 61 regional Task Force Agencies to help law enforcement agencies eradicate criminal internet abuse targeting children. See http://www.icactraining.org/ (last accessed July 23, 2010).[1] These Task Forces, funded by state, local, and federal money, and the law enforcement officers who work with them, process cases in a formulaic manner, relying on canned affidavit language. The *Weber* court for good reason labeled such language "boilerplate." *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990). Except for a few "fill in the blank" areas, page after page of boilerplate language is inserted into affidavits that contain no information specific to the defendant, to convince over-worked and unsuspecting Magistrates to issue warrants. Day after day, in district after district, local Task Force agents insert entire sections of boilerplate into child pornography affidavits, regardless of the suspect's individual conduct.

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[1] One such ICAC task force helped execute a warrant related to this case. *See* Pet. App. 75.

Hundreds of such search affidavits are being generated and some warrants are being executed every day while this Court ponders this Petition.

Unless this Court accepts the Petition and corrects the appellate court's misapplication of *Leon* and of the principles of the Fourth Amendment, affidavits stating no connection to an individual defendant will be submitted and warrants will issue even when, as in this case, "there is not a whit of evidence in the affidavit indicating that [a suspect] fit a collector profile." Pet. App. 27.[2]

B. Now is the time to resolve the constitutional issues posed in the Petition.

The constitutional issues posed in this Petition must be decided now, because email users cannot prevent being targeted with unsolicited emails; and because scores of search warrants are likely being drafted for the search of computers whose owners did not knowingly receive the illegal matter emailed to them.

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[2] The district court also clearly noted that there was no evidence here that Petitioner "uploaded illegal images, participated in internet forums, or in any way controlled the illegal images at issue." Pet. App. 27. This fact sets this case apart from the other appellate cases involving probable cause in internet-related possession of child pornography, as discussed on pages 14-16 of the Petition.

This Court has a broad obligation to resolve constitutional questions when necessary. *See e.g. Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered practice not to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.") (citations omitted).

The "public importance of the questions" presented in the Petition and "the duty which rests on the courts . . . to preserve unimpaired the constitutional safeguards of civil liberty" create the necessity for this Court to "consider and decide th[e posed constitutional] questions without any avoidable delay." *See Ex parte Quirin*, 317 U.S. 1, 23 (1942). This Court should resolve these questions now rather than abstaining and waiting for the result of the prosecution. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

C. The reasons to accept the Petition far outweigh the reasons against acceptance.

The Petition presents extraordinary circumstances and weighty constitutional issues, both of which support certiorari review despite the case's interlocutory posture. *See e.g. Mazurek v. Armstrong*, 520 U.S. 968 (1997); *Frisby v. Schultz*, 487 U.S. 474 (1988) (First Amendment challenge to ordinance

barring residential picketing where further proceedings would not aid Court).

The several factors addressed below further support review now.

The questions posed by Petitioner can be decided on the available record and the constitutional questions brought on the Petition were thoroughly briefed in the court of appeals. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts.").

If the Petition is not granted, proceedings on remand from the appellate court to the district court will rely on the constitutional error challenged by Petitioner, which should be avoided.

Issuance of certiorari now is also necessary to avoid "extraordinary inconvenience and embarrassment in the conduct of the case." *American Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). If this Court grants the Petition and agrees with the Petitioner, the incalculable extraordinary inconvenience and embarrassment – indeed hardship – of the trial, and of subsequent appeals if convicted, will be avoided. This, in turn, will protect the Petitioner from possible bankruptcy, personal and family crises, social stigma, loss of employment, and other all-too-common dire collateral consequences of federal prosecution on charges involving child pornography. *See id.*

Finally, by the express terms of a statute, this Court has jurisdiction to grant the Petition although the judgment is not final. The applicable jurisdictional statute is Title 28 United States Code § 1254(1), which in pertinent part provides: "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The traditional reasons for denying certiorari review at this time are absent in this case.

One reason why this court "generally" awaits final judgment in lower courts before exercising its certiorari jurisdiction is that "many [non-final] orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Constr. Co.*, 148 U.S. at 384. Such is not the case here, so this reason does not support denial of certiorari.

Absent here are also various other reasons for which this Court in the past decided to wait for the final judgment, including avoidance of what would be an advisory opinion if further proceedings mooted the issue raised in the petition and allowing the Court to assess any federal-law issue upon a complete and settled record. *See e.g. Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945); *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

In this case a review of the appellate court's decision favorable to Petitioner will in effect decide the merits of the case. Without the evidence sought to be suppressed, the prosecution cannot proceed.

No substantial progress has been made towards the final decision, as the case is in pre-trial posture. The district court stayed proceedings. The government did not object to the stay. Thus, granting review at this time would not halt a process that is on track towards a quick completion. In fact, granting the Petition would save the parties and the courts from substantial wasted effort and would conserve judicial resources. Review of the interlocutory ruling in this case would spare the parties inconvenience, litigation costs, and a delay in determining ultimate justice – rather than the opposite. *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964).

This Court seldom grants review in cases that would benefit from further factual development of the issues. *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, the interlocutory posture of the appellate court's ruling leaves no unsettled factual questions critical to the Petition; or to the underlying constitutional rules that Petitioner asks this Court to employ.

For the above reasons, this Court should now accept this case for review and should not deny the Petition based on the case's interlocutory posture.

II. THE APPELLATE COURT DID RULE ON THE ISSUE OF PROBABLE CAUSE AND SO SHOULD THIS COURT

The Solicitor General errs in stating, at pages 9-10 of his Brief in Opposition, that this Court should not pass on the issue of probable cause because it was not passed-on by the appellate court.

The district court held that the *Leon* exception did not apply because the warrant was so lacking in probable cause as to make official belief in the existence of probable cause entirely unreasonable. *See* Brief in Opposition 12.

The appellate court reversed, holding that indicia of probable cause were not so lacking from the affidavit as to prevent reasonable official belief in its existence. The appellate court concluded that the warrant affidavit stated sufficient indicia of probable cause for the *Leon* exception to apply. *See* Pet. App. 5-6, 9-10; *see also* Brief in Opposition 8.

Thus, the appellate court's ruling on the *Leon* exception included a ruling on probable cause. The *Leon* exception and probable cause are two issues that are inseparably interwoven here, contrary to the Solicitor General's Brief. *See id.* at 9-10.

As argued at pages 13-17 of the Petition, no other appellate court would rule that this affidavit presented sufficient probable cause to allow objective official belief in the existence of probable cause. This indicates that the appellate circuits are split on this

issue, contrary to the Solicitor General's argument on pages 10-11 of his Brief in Opposition.

Therefore, this Court should address "probable cause" in the warrant affidavit, as one of the crucial, vibrant constitutional issues posed by this extraordinary and urgent case.

III. THE AFFIDAVIT DID NOT ALLEGE ANY FACTS TENDING TO PROVE "RECEIPT" OF CHILD PORNOGRAPHY

Based solely on the fact that several emails with child pornography were sent to Petitioner, the appellate court concluded, Pet. App. 5-6, that Petitioner received those emails and that the warrant affidavit "established" probable cause for Petitioner's "receipt" of child pornography.[3] The court assumed, without analysis or support in the affidavit, that Petitioner "received" the eleven emails with illegal content sent to him and that he was a "recipient." Pet. App. 9. This conclusion is erroneous as stemming from unverified assumptions and the fallacious logic of "begging the question." *Id.*

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[3] The Solicitor General attempts to validate the search by referring loosely to seemingly incriminating evidence gathered as a result of the search. Brief in Opposition 3. Any such evidence would be subject to suppression as fruit of a poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The Petitioner has argued from day one in this prosecution that the warrant contained no evidence of his receipt or possession of child pornography – none; and that it lacked any indicia of probable cause that would support reasonable official belief that evidence of receipt of child pornography would be found on his computer – because it only asserted that he had been targeted with illegal emails. *See e.g.* Pet. App. 5, 6, 7. The district court agreed with the Petitioner. *Id.* So would other appellate courts, as argued in the Petition and elsewhere in this Reply. Petition at 14-17.

Yet the Court of Appeals for the Seventh Circuit ruled that being an addressee of emails with attached child pornography – with nothing more – sufficiently supports reasonable official belief that a suspect knowingly received child pornography. That holding was contrary to the holdings of other appellate courts. *Id.*

Because the appellate court disagreed with the Petitioner's argument regarding probable cause, which was supported by the opinions of other appellate courts, this Court can and should properly address it, contrary to the Solicitor General's Brief.

For all the above reasons, this Court should grant the Petition.

Respectfully submitted,

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Supreme Court of the United States

TED L. PAPPAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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I. RECENT EVENTS IN WISCONSIN PROVE THAT INNOCENT INDIVIDUALS ARE BEING TARGETED WITH E-MAILS CONTAINING CHILD PORNOGRAPHY.

Pursuant to Supreme Court Rule 15.8,[1] Petitioner Ted L. Pappas, by and through his attorneys, submits this Supplemental Brief in support of his Petition for a Writ of Certiorari to review the interlocutory decision and order of the United States Court of Appeals for the Seventh Circuit.

By this Supplemental Brief, Petitioner seeks to call to this Court's attention a relevant intervening matter not available at the time of the filing of his Reply Brief on July 28, 2010, which was Petitioner's last filing. *See* S.C.R. 15.8.

The relevant intervening matter consists of the fact that unsolicited child pornography e-mails have recently been sent to several Wisconsin legislators in an extortion effort.

This news story first broke on August 2, 2010, several days after Petitioner's Reply Brief was filed with this Court. Two articles reporting this story are listed in the Table of Authorities and read as follows:

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[1] Rule 15.8 expressly allows "[a]ny party [to] file a supplemental brief at any time while a petition for certiorari is pending, calling attention to . . . intervening matter not available at the time of the party's last filing."

Posted August 3, 2010

Who sent e-mails with child porn to Wisconsin lawmakers?

The Associated Press

MADISON – State criminal investigators are trying to determine who sent e-mails containing images of child pornography to Wisconsin lawmakers in July as part of a blackmail plot.

Ed Wall, the head of the state Justice Department's criminal investigations unit, sent an e-mail Friday to the offices of all 132 state lawmakers warning them of e-mails sent containing child porn.

"The sender acknowledges that the intent of the note was to place child pornography on the recipient's computer as leverage to attain a desired legislative agenda," he wrote.

Wall urged lawmakers not to open any attachments or to forward the e-mails if they receive them. The subject line in the messages varies and is misleading, he said.

All of the e-mails were sent since July 23 and contain a message regarding investigative efforts by a private group of individuals, Wall said.

The DOJ has declined to release a copy of the threatening e-mail, saying it is part of an ongoing investigation.

> Capitol Police Detective Ed Bardon declined to say how many offices received e-mails. A person must knowingly be in possession of child pornography in order to be in violation of state law. The person must also know that the material is sexually explicit and involving children under age 18.
>
> Over the past 10 years, the Department of Justice's Internet Crimes Against Children Task Force has arrested more than 728 people on child porn charges and executed more than 1,017 search warrants, Attorney General J.B. Van Hollen said.

Associated Press, August 3, 2010, "Who sent e-mails with child porn to Wisconsin lawmakers?," available at http://m.greenbaypressgazette.com/apps/pbcs.dll/article?AID=/20100803/GPG0101/8030585/1207/GPGnews (last accessed August 18, 2010).

> ***E-mailer tries to extort Wisconsin lawmakers***
>
> **Mail tries to put child porn on representatives' computers, official says**
>
> By Daniel Bice and Patrick Marley of the Journal Sentinel
>
> Aug. 2, 2010
>
> State officials have launched a criminal investigation to determine who sent e-mails trying to extort at least a half-dozen lawmakers by infecting their Statehouse computers with child pornography.

Edward Wall, administrator of the Division of Criminal Investigation, contacted lawmakers late last week to tell them to avoid opening attachments to suspicious e-mails.

"The sender acknowledges that the intent of the note was to place child pornography on the recipient's computer as leverage to attain a desired legislative agenda," Wall wrote late Friday. "The Division of Criminal Investigation is working with the Capitol Police on this investigation."

Rep. Joel Kleefisch (R-Oconomowoc) said his staff told him he'd received an inappropriate e-mail disguised as a message about cable TV rates.

"I think it is abhorrent that anyone would ever use child pornography as leverage for anything," Kleefisch said. "We're dealing with someone who should be behind bars, because he's trafficking in child pornography."

According to a copy of the message sent to a lawmaker, the e-mailer is part of a team of people on a mission to "hunt down and locate individuals who are involved in the child sex trade." The group has forced a number of these people to make payments instead of being exposed or prosecuted, the e-mailer claims.

"My motivations have not been altruistic, but financial," says the e-mail.

The e-mailer asks lawmakers to cut all funding to the state task force responsible for identifying and prosecuting those involved in child sex crimes, including child pornography. The message says the task force is using tax dollars to try to accomplish what the e-mailer's team is already doing more effectively at no cost to the state.

The legislators also were urged to pass a bill increasing the penalties for possessing child pornography so offenders would be sentenced for each piece of porn found in their possession, according to the e-mail. The proposed legislation, the e-mailer said, should be modeled after the child pornography law in Arizona.

"Do not put your faith in law enforcement to find us," the e-mailer wrote. "We are using tactics that make us untraceable online."

The only lawmaker the e-mail mentions by name is Assembly Majority Leader Thomas Nelson (D-Kaukauna), who is running for lieutenant governor.

"If you care to speak with Representative Nelson, he will let you know that my presence in his inbox has been ongoing for most of the year," the e-mail says. "I have gone by many monikers, but he'll best know me as 'pthc_luvr.'"

Nelson did not immediately return a phone call.

The message also makes reference to a supposed incident in March in which the team cracked into several wireless systems near the Kaukauna Police Department to make a "psychological statement" to law enforcement. It also says the group altered traffic patterns there, resulting in a series of accidents on U.S. Highway 41.

But Kaukauna Police Chief John Manion said he knew nothing about either situation. He said he also had not been contacted by state investigators about the letter.

"It just came to my attention because of the Kaukauna connection," Manion said Monday.

Also receiving the e-mail was Rep. Mark Pocan (D-Madison), co-chairman of the powerful Joint Finance Committee. Pocan declined to comment.

The names of other recipients could not be confirmed, but the e-mails appear to be targeted to members of the Assembly. There have been no reports of senators receiving the messages so far.

Wall said Monday he couldn't discuss the case.

"We have an ongoing criminal investigation," he said.

His note to lawmakers said the subject line in the e-mails, which started going out July 23, varies and is often misleading. He

> asked members of the Senate and Assembly not to open or forward any of the suspicious messages.
>
> An aide to Assembly Speaker Mike Sheridan (D-Janesville) said he had not received one of the messages and declined further comment, referring questions to the Capitol Police.

Bice, Daniel and Patrick Marley, "E-mailer tries to extort Wisconsin Lawmakers," the Journal Sentinel, August 2, 2010, available at http://www.jsonline.com/news/statepolitics/99784764.html (last accessed August 18, 2010).

The relevancy to this Petition of the events reported in the above articles cannot be overstated.

First, these events support the Petitioner's assertion, in his prior Briefs, that innocent citizens are daily targeted with e-mails containing child pornography. The district court agreed, concluding that such targeting does and will occur, despite any putative risks; and thus that being an addressee of e-mails with child pornography – without any act affirmatively displaying interest in such illegality – does not support probable cause. The recent events in Wisconsin bolster the district court's conclusion.

Second, these events prove wrong the appellate court's assertion that the risks of sending child pornography to innocent recipients deter or prevent such targeting of innocents. *See* App. 6. The events reported in the cited articles provide irrefutable

evidence that the appellate court erred in so asserting.

Finally – and most importantly – these events illustrate the danger identified by the district court: that virtually every e-mail user would be subject to search and to prosecution for knowing possession or receipt of child pornography, if being an addressee of e-mails with child pornography, alone, were to support official belief in probable cause for these crimes.

For all the reasons given in this Supplemental Brief and in Petitioner's original Brief, this Court should grant the Petition.

Respectfully submitted,

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